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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 285 (GBD)

5 LAURENCE F. DOUD III,

6 Defendant.

Trial

7 -----x

8 New York, N.Y.
9 January 26, 2022
9:50 a.m.

10 Before:

11 HON. GEORGE B. DANIELS,

12 District Judge
13 -and a Jury-

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
17 Southern District of New York

BY: NICOLAS T. ROOS

18 ALEXANDRA ROTHMAN

THOMAS S. BURNETT

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19 ROBERT C. GOTTLIEB

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Attorneys for Defendant

21 Also Present: Sunny Drescher

22 Jacqueline Hauck

Paralegal Specialists

23 Special Agent George Burdzy, DEA

Investigator Kathleen Whitmore, DEA

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(Trial resumed; jury not present)

THE COURT: Good morning. I want to just discuss a couple of issues before we continue. First of all, let's talk about scheduling. The government anticipate that they will probably rest today?

MR. ROOS: Yes.

THE COURT: All right. What I'd like to do is have the government rest today and have the defense fill up tomorrow with witnesses.

MR. GOTTLIEB: Your Honor, yes. After court yesterday, we do have a witness for tomorrow.

THE COURT: And that witness is going to take how long?

MR. GOTTLIEB: We also informed the government, we've actually reduced the witnesses, we will only have two witnesses. One is available that is flying in tonight. The final witness would be on Monday, your Honor.

THE COURT: How long would that witness be?

MR. JANEY: I think it's fair to say, your Honor, the direct on that witness would last somewhere around 45-plus minutes. And whatever the cross would be.

THE COURT: How long do you anticipate tomorrow's witness will be?

MR. GOTTLIEB: A short witness.

THE COURT: All right.

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1 MR. GOTTLIEB: A character witness, your Honor,
2 tomorrow.

3 MR. ROOS: If the other one is the paid expert, can't
4 he come here this week?

5 MR. GOTTLIEB: The answer is no, your Honor. In light
6 of -- until yesterday, we were told they were going to be at
7 least another two witnesses, which we knew were going to take
8 more time.

9 THE COURT: I don't know why you had that impression.
10 I didn't have that impression.

11 MR. GOTTLIEB: No, no, but we did because we had a
12 list of their witnesses and we knew what those witnesses were
13 going to say, and what the cross-examination was going to be.

14 THE COURT: Well, so you want to bring in the jury for
15 45 minutes, an hour tomorrow, and then you want me to bring
16 them in for an hour Monday?

17 MR. GOTTLIEB: Your Honor, listen, we will do whatever
18 your Honor wants.

19 THE COURT: What I want is I want both witnesses to
20 testify tomorrow so we could be ready to go forward with
21 summations and charge by Monday. That's what I want. Can you
22 satisfy me in that regard?

23 MR. GOTTLIEB: I regret to say that we are unable to
24 do that. But I want you to know, your Honor, it is not because
25 we weren't gearing up. Based on what information we had as of

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1 yesterday evening, we understood there were going to be at
2 least another two witnesses, and they were not insubstantial
3 witnesses.

4 THE COURT: As I say, I didn't have that impression
5 and I don't know why you did. And I've been telling this jury,
6 every day, where I thought we were at least.

7 MR. GOTTLIEB: That's why I say. Based on what it is,
8 I thought this was consistent with what we were all operating
9 on, that we would be able to rest on Monday.

10 THE COURT: Is your second witness available Friday
11 morning?

12 MR. GOTTLIEB: I don't believe so. We just -- we made
13 contact yesterday. We understand the witness, based on the
14 scheduling we had laid out for the witness was for, is
15 available on Monday, your Honor, first thing Monday. Actually,
16 we also, there are other things that will have to be done. We
17 have a significant Rule 29 motion that will be filed by the end
18 of today.

19 THE COURT: Yes, but that doesn't help me, because the
20 Rule 29 motion shouldn't delay the witnesses. I'd like you to
21 speak to that witness, and tell that witness that I'd like that
22 witness here tomorrow. And I need to know specifically if
23 that's not possible, why that is not possible. I want to
24 finish these witnesses tomorrow. And I don't want to waste the
25 jury's time bringing them in an hour tomorrow, no testimony on

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1 Friday and bringing them in for an hour on Monday. That's not
2 the way I want to proceed. And this is an expert witness that
3 you're paying him for his time. So, unless he can give me some
4 real good excuse why what he's doing tomorrow is more important
5 than this trial, I want to see him here tomorrow. Let's wind
6 these witnesses up. All right?

7 Can you do that?

8 MR. GOTTLIEB: We'll definitely make contact; yes,
9 your Honor.

10 THE COURT: All right. Do that and let me know as
11 soon as possible whether we can accomplish that. If we can
12 accomplish that, then I can give the jury a better idea. But
13 right now I'm sort of, they're sort of hoping and wishing we
14 wind up some time soon. There is supposed to be a big storm
15 this weekend. I'd rather not have the jurors in on Friday. If
16 necessary, if your witness is available Friday morning and is
17 only going to be an hour, I think the jurors would probably
18 prefer to do Friday morning for an hour and then go home for
19 the weekend and then come back on Monday. But to sort of say
20 to them an hour on Thursday, no trial on Friday, an hour on
21 Monday, I don't think they should be happy about that.

22 MR. JANEY: If we can pull the thread on that, it may
23 be easier for the expert to be here Friday morning than
24 tomorrow. So if we can take leave of that option.

25 THE COURT: I'd like you to first take leave of the

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1 option of getting that witness here tomorrow.

2 MR. JANEY: I understand.

3 THE COURT: If this witness shows up tomorrow, I'll
4 put this witness on, and given the schedule that you informed
5 me about, we will do that witness until that witness is
6 finished tomorrow so that witness won't have to come back. You
7 can emphasize that to the witness. But, as they say, this is a
8 paid witness, this is not a witness that's dragged in here by
9 subpoena. They know there is a trial, and if he has any
10 experience at all, he knows he should be available during that
11 trial and not telling us he has something better to do.

12 Talk to him right away and let me know before lunch
13 whether or not we can accomplish that so I can inform the jury
14 about what the schedule is like. The first option is getting
15 him here tomorrow. If he says, if he gives a good reason why
16 he can't be here tomorrow afternoon, then you can tell me
17 whether or not he's available Friday morning, and tell me
18 whether or not he's available Monday morning.

19 MR. GOTTLIEB: Your Honor, with regard to scheduling
20 also, as a result of obviously the changes that the government
21 informed us of yesterday, and not calling certain witnesses, we
22 sent over to chambers last night and filed on ECF two
23 subpoenas.

24 THE COURT: Yes. That's the next issue.

25 MR. GOTTLIEB: And those subpoenas in fact are

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1 business records so we believe, either, one, the government
2 should be able to stipulate to it, but if not, that's their
3 choice. We'll get a custodian of records, but we've already
4 been in touch with the parties, they are working to put them
5 together.

6 THE COURT: That was part of my question. First of
7 all, I was going to say, isn't it a little late to be
8 requesting to subpoena, to issue a trial subpoena for these
9 documents and aren't these documents documents that were
10 produced by the government?

11 MR. GOTTLIEB: No.

12 THE COURT: Okay.

13 MR. GOTTLIEB: Well, one document, which is the chart
14 of terminated and suspended pharmacies from 2012 to 2017, the
15 relevant time of the indictment.

16 THE COURT: You have all of that, don't you?

17 MR. GOTTLIEB: We do. But if you recall, that's the
18 document that the government originally, we had that
19 information as a government exhibit, but then the exhibit that
20 they introduced only covered 2017, if you recall. So we have
21 the actual document that was provided by the government to us,
22 but being they didn't introduce it, it now befalls on us to get
23 the full document in evidence.

24 THE COURT: I thought it was your position that any of
25 this evidence post-2017 was irrelevant to this case.

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1 MR. GOTTLIEB: Yes, but the document they put in was
2 2017 going forward. The part of the document which we thought
3 is relevant is 2012 to 2017.

4 THE COURT: Right. Don't you have those documents?

5 MR. GOTTLIEB: No. That was left out of the document
6 that they introduced.

7 THE COURT: Was that left out of the documents that
8 were produced to you by the government in response to your
9 request?

10 MR. ROOS: They have it.

11 THE COURT: They have it?

12 MR. ROOS: Yes.

13 MR. GOTTLIEB: Yes, we have it.

14 THE COURT: Why are we subpoenaing these individuals
15 to produce this voluminous documents by tomorrow?

16 MR. GOTTLIEB: It's not voluminous. I am simply --
17 your Honor, I'm simply asking if the government will stipulate
18 to their original exhibit, then I don't need a subpoena. Then
19 we'll just stipulate, it will take 20 seconds. If they're not
20 going to stipulate to it, then I need somebody from RDC, the
21 custodian of records, they are aware of that chart, to be able
22 to put it in evidence as a business record.

23 THE COURT: So which chart are you talking about?

24 MR. GOTTLIEB: 278. Government Exhibit 278 as
25 originally given to us is different than the Government Exhibit

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1 278 that was placed in evidence, because it leaves out all of
2 the terminated and suspended pharmacies from 2012 to 2017.
3 We're interested in getting in the business record of the
4 pharmacies that were terminated, suspended from 2012 to 2017.

5 THE COURT: Okay. So, you have two charts, but what
6 you want to subpoena is the underlying documentation?

7 MR. GOTTLIEB: Nope.

8 THE COURT: But I thought those charts were created by
9 the government.

10 MR. GOTTLIEB: No. Well, we don't believe the charts
11 are actually created by the government. We believe it is a
12 business record of RDC.

13 THE COURT: And you say that both the original one you
14 received and the second one you received are business records
15 of RDC?

16 MR. GOTTLIEB: Yes.

17 THE COURT: Okay. So, what's the government's
18 position as to whether or not we need to subpoena these
19 documents and they need to lay some foundation with regard to
20 the admissibility of these documents?

21 MR. ROOS: Yes, your Honor. The document in question
22 which your Honor has seen a few times is 278, which is in
23 evidence, which is a log that was produced by Rochester Drug to
24 the government back in 2020, and it was produced to the defense
25 in discovery, and marked as an exhibit. The document that's in

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1 evidence lists all of the terminations and suspensions that
2 Rochester Drug did from 2017 to 2020. And Jessica Pompeo Bouck
3 testified she created it, and it was part of their normal
4 practice in 2017 through that period to log the suspensions and
5 terminations.

6 THE COURT: That's not the document that they're
7 interested in.

8 MR. ROOS: Correct.

9 THE COURT: That document is already in evidence.

10 MR. ROOS: That's in evidence, no problem.

11 THE COURT: They say there is a different document
12 that has different information, has either additional
13 information or less information on it.

14 MR. ROOS: Exactly, your Honor. They want a version
15 of the spreadsheet that has additional data which is the period
16 predating 2017.

17 THE COURT: What's the problem?

18 MR. ROOS: The problem is that the pre-2017 stuff was
19 an after-the-fact creation. The document starts being put
20 together once RDC is under investigation. So they're under
21 investigation in 2017, and they're logging everything
22 afterwards.

23 Because the government's asked RDC what happened
24 before 2017, they had people try to recreate what the
25 terminations were. And so but there's problems with it. Like

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1 for instance, when defense counsel asked on cross of Jessica
2 Pompeo about that document, she said I don't recall that. Or I
3 wasn't there during some of those terminations. So she wasn't
4 able to authenticate the underlying data.

5 THE COURT: Is the underlying data inaccurate or
6 accurate?

7 MR. ROOS: I think it is inaccurate. I'll give you
8 two examples. One is it says ProHealth was suspended at a time
9 in 2015. In the documents we have from RDC we haven't seen
10 evidence of that. When the witness has been asked about that,
11 for instance, the witness yesterday said he didn't recall it.
12 On the flip side the defense has put in an exhibit that says
13 Waschko was terminated. But there is no termination listed on
14 the spreadsheet of Waschko.

15 THE COURT: They got that document from you, didn't
16 they?

17 MR. ROOS: Yes. Totally. The point is, I'm not
18 questioning whether or not Waschko was actually terminated. I
19 am saying the part of the spreadsheet that they want to put in
20 seems to be factually inaccurate because it's both, maybe
21 including either have wrong dates and/or just missing data.

22 THE COURT: Who prepared that document?

23 MR. ROOS: Jessica Pompeo.

24 THE COURT: Is there a reason why Jessica Pompeo's
25 document that she prepared is inadmissible?

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1 MR. ROOS: Well, they tried -- they tried to
2 authenticate it with her and she said I'm not sure, I don't
3 recall those things. The reason it is inadmissible --

4 THE COURT: The question is not whether she recalls
5 the information on the document. The question is whether or
6 not that was a document created by her.

7 MR. ROOS: Which is admissible because it's a business
8 record, but it is not a business record if it is after the fact
9 and inaccurate.

10 THE COURT: What's your position with regard to this
11 document?

12 MR. ROOS: That portion of the document is
13 inadmissible because it is factually inaccurate or is missing
14 data or is over-inclusive. It is going to mislead the jury.

15 THE COURT: Your position is that they're not in a
16 position to be able to admit this document into evidence.

17 MR. ROOS: Through a record custodian.

18 THE COURT: Not through anybody period. I didn't ask
19 you about that.

20 Is it your position that they're not in a position to
21 admit this document in evidence? Period.

22 MR. ROOS: Yes. With one caveat, which is with
23 Jessica Pompeo --

24 THE COURT: No, but I don't care about Jessica Pompeo.
25 I want to know what you are fighting about. I want to know why

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1 you are trying to keep it out if you say they can't
2 authenticate it.

3 MR. ROOS: Bottom line, I think there are either
4 inaccuracies or potential inaccuracies in that part, so it is
5 inadmissible.

6 MR. GOTTLIEB: Your Honor, first of all, the reason
7 why that's really is not logical is Jessica Pompeo, in creating
8 the document, also had to look back at records going back to
9 2017. There is no difference between looking back at records
10 and creating the document starting in 2017, versus going back
11 to 2012. They just don't like the information on the document.
12 It is a business record.

13 I contacted the government to the avoid even this
14 colloquy and even the subpoena. For some reason they are
15 trying to block the business record of 2012 to 2017. And if
16 that's the case, then our option is to get a custodian of
17 records on the stand, or to recall Jessica Pompeo.

18 THE COURT: When you say it is a business record, is
19 it a record that was created for the government in this
20 prosecution or is it a record that was created in the regular
21 course of business of RDC?

22 MR. GOTTLIEB: So, the answer is I don't know.

23 THE COURT: That's important, isn't it, to define it
24 as a business record?

25 MR. GOTTLIEB: Well, but if RDC is going to -- we've

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1 been in touch with them -- is going to certify that this is a
2 certified business record, I rely on the custodian of records
3 or the recipient of a subpoena. I will also mention, your
4 Honor, that it is our understanding that their expert on the
5 stand now has relied, and on their one of their charts, they
6 have Government Exhibit 278 with regard to terminations, and it
7 appears that that's a source material, the earlier, the one
8 that we are trying to introduce, may be the source material
9 that their expert reviewed in preparing one of the charts on
10 page 18 of the exhibit.

11 THE COURT: Did you attempt to offer that second
12 document -- which document are we talking about? The one that
13 you are interested in now, what's the number of the exhibit?

14 MR. GOTTLIEB: It was marked --

15 MR. JANEY: Government Exhibit 278.

16 THE COURT: No, but 278 I thought was the one that was
17 admitted in evidence.

18 MR. ROOS: Do you remember yesterday when they were
19 asking Bill Pietruszewski about a spreadsheet he said he hadn't
20 seen? That's the document.

21 THE COURT: Right. But that was even, that was even
22 shown to a previous witness.

23 MR. ROOS: Yes.

24 THE COURT: So what is the exhibit number of that?

25 MR. GOTTLIEB: I'm sorry, Defense 82.

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1 THE COURT: Defense 82.

2 MR. GOTTLIEB: Marked for identification.

3 THE COURT: I don't remember, did you attempt to offer
4 Defense 82 in evidence?

5 MR. GOTTLIEB: I believe --

6 THE COURT: I don't have that recollection.

7 MR. GOTTLIEB: No, because we didn't reach that point.
8 Because the person on the stand -- it was clear they were not
9 going to be able to establish the foundation.

10 THE COURT: So, I'm trying to understand what the
11 government's position is. Is it the government's position that
12 this document is inadmissible and that you are going to oppose
13 them offering that document in evidence?

14 MR. ROOS: I'm sorry. That we are going to what?

15 THE COURT: Oppose their offering that document in
16 evidence.

17 MR. ROOS: Yes, your Honor.

18 THE COURT: What do you contend that that document is?

19 MR. ROOS: So the document is back in either late 2019
20 or in 2020, the government asked the lawyers for RDC, can you
21 send us a list of all the terminations and suspensions of RDC
22 customers. And they sent us this list.

23 THE COURT: How was that list created? Was it already
24 in existence or was that list created at that time?

25 MR. ROOS: Some of this came out in testimony and some

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1 of it is just in the 3500. I'll try and parse it for your
2 Honor.

3 As we understand it, the metadata on the document says
4 it is created by Jessica Pompeo. Jessica Pompeo testified that
5 they were keeping logs of some of this stuff, and she pulled
6 that together to put it into the spreadsheet. When we were
7 analyzing it with her, we determined that some of this was
8 stuff, once RDC was under investigation, they just started
9 logging these things.

10 THE COURT: What does that --

11 MR. ROOS: That's fine. That's fine. That's a
12 business record.

13 But the stuff before, because the government said to
14 RDC's lawyers, we want to know back to 2013, or 2012, so the
15 stuff before they had to recreate. And as we're analyzing the
16 work product they created, it looks like it is inaccurate. It
17 just looks like it's wrong.

18 THE COURT: But, that's an issue for testimony.
19 That's not an issue with regard to the document. Whether or
20 not a document has wrong information on it doesn't affect its
21 definition as a business record. And I don't understand why if
22 they -- and even if the government, even if the U.S. attorney's
23 office asked them to create this document, and I'm not even
24 sure you are saying you asked them to create this document.

25 MR. ROOS: We requested the information and they

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1 created the spreadsheet.

2 THE COURT: You didn't ask them to create any
3 document. You didn't ask them to create a spreadsheet.

4 MR. ROOS: I said we said can you send us a list.

5 THE COURT: They sent you that list. Your position
6 is, because you asked for the list, that that makes it
7 inadmissible?

8 MR. ROOS: No. It's not because we asked for the
9 list. The point is, the document is inadmissible for two
10 reasons. Number one is it's not a business record because they
11 just, they just as part of their response to the government's
12 request, did a counterfactual recreation of when they --

13 THE COURT: Why is that excluded as a business record?

14 MR. ROOS: It is not made in the regular course of
15 business activity.

16 THE COURT: It was to respond to whatever request the
17 government made of them and they responded by creating this
18 document. You didn't tell them to create this document. They
19 created this document and they put it in their files.

20 MR. ROOS: I don't think that's the definition of a
21 business record.

22 THE COURT: What do you think is the part of business
23 activity?

24 MR. ROOS: Part of their regular activity.

25 THE COURT: You don't think this is part of their

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1 regular activities, to respond to government requests for
2 information?

3 MR. ROOS: Jessica Pompeo, no, I don't.

4 THE COURT: Don't they respond to requests from DEA on
5 a regular basis?

6 MR. ROOS: Sure, but not the U.S. attorney's office
7 pursuant to subpoena.

8 THE COURT: You say that if the testimony is that this
9 is a document that was created in the regular course of
10 business and kept in the regular course of business because it
11 is a document that we have a responsibility to respond to law
12 enforcement requests. Law enforcement made a request. Law
13 enforcement did not tell us to create this document. We
14 created this document in the regular course of our business to
15 respond to government requests for documents. We gave this
16 document to the government and we put it in our files, and we
17 kept it in our files since that day. You don't think that
18 qualifies a business record?

19 MR. ROOS: If that's a business record, then why isn't
20 Rochester Drug's factual admissions in response, in letters in
21 response to the government, also a business record?

22 THE COURT: Because it could be. It depends. It
23 depends on whether they are going to keep those letters in
24 their files, and it's their regular course of business to
25 respond by e-mail and to keep those e-mails in their files, so

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1 if somebody wants to review those documents, law enforcement or
2 civil litigation, they can say yes, we have such a document, we
3 keep it in our files, we don't care whether or not the
4 president of the United States asked us for the information and
5 that's what prompted us to create this document in the regular
6 course of business. But that's what we do.

7 Pompeo would say, I didn't create this out of the
8 regular course of business. This is my job. I created this
9 when they asked for it, because they asked for that kind of
10 information. They didn't ask me to create the document. They
11 asked me to provide them the information. So I created the
12 document, and I supplied that information to the government,
13 and I put that information in our file because that's what we
14 would do. I wouldn't tear it up after I give it to the
15 government and not keep it. I would create it, I created it
16 and I put it in our files, and it's been in our files since
17 then and will remain in our files until and unless somebody
18 else asks for it.

19 I don't understand why that doesn't qualify as a
20 business record.

21 MR. ROOS: The rule says at the time the data is
22 created, and this is after the fact.

23 THE COURT: What's after the fact?

24 MR. ROOS: The spreadsheet is just a summary. The
25 data is not at or near the time of the date of its creation.

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1 THE COURT: You are making an argument about that
2 sheet which is not the argument that you even make about the
3 sheet that's in evidence.

4 MR. ROOS: That data was created at around the time.

5 THE COURT: How is that data --

6 MR. ROOS: They logged it at the time.

7 THE COURT: At what time?

8 MR. ROOS: When they terminated them.

9 THE COURT: That was not the testimony, that that
10 large sheet of Government Exhibit 278 was created at the time
11 that is listed as to each one of the terminations?

12 MR. ROOS: I think at 598 and 599 of the transcript
13 she says we were logging this stuff.

14 THE COURT: That's not even possible. You can't, if
15 she gave us a spreadsheet that covers a period of time from
16 2012 to 2017, you cannot argue that that spreadsheet was
17 created in 2012. That wasn't created in 2012.

18 MR. ROOS: I agree. The original version was created
19 in 2017.

20 THE COURT: So...

21 MR. ROOS: And we only offered 2017 onwards.

22 THE COURT: How does that make that admissible and
23 make the other one not admissible?

24 MR. ROOS: Every time they'd go in and type it in.

25 THE COURT: Creating the document.

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1 MR. ROOS: Then the final version. But it is a log.
2 It is different than an after-the-fact creation, and the other
3 issue, your Honor, is the 403 issue.

4 THE COURT: What's the 403 issue?

5 MR. ROOS: It is inaccurate data.

6 THE COURT: Isn't that --

7 MR. ROOS: It's going to mislead the jurors.

8 THE COURT: Isn't that an issue for the jury to
9 determine?

10 MR. ROOS: Well, the issue is --

11 THE COURT: Who is going to say it is inaccurate data,
12 you?

13 MR. ROOS: We'd like an opportunity to.

14 THE COURT: I can't take your word for it. You don't
15 know. You know it's different data. And you think yours is
16 right and the other one is wrong, but you don't know that.
17 Nobody said that.

18 MR. ROOS: There is two examples which is the
19 ProHealth date being wrong and Waschko not being on there.

20 THE COURT: That doesn't prove which one of those is
21 inaccurate.

22 MR. ROOS: Both would be inaccuracies in the chart.

23 THE COURT: All right.

24 MR. ROOS: A date being wrong -- the issue, your
25 Honor, is if they are going to put this in without a witness,

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1 there is no one we can cross-examine.

2 THE COURT: I'm not particularly sympathetic to that
3 because you asked the document to be created, and it was
4 created by RDC, and was given to you and then kept in RDC's
5 files.

6 MR. ROOS: I think they are sandbagging us.

7 THE COURT: How are they sandbagging you?

8 MR. ROOS: They didn't offer it and now they are
9 trying to offer it.

10 THE COURT: You knew you had two different documents
11 that said two different things. You knew that when we started
12 this trial. You weren't sandbagged by it. You knew it and you
13 decided that you would just, whatever records you wanted to
14 create with regard to that, you created that record. I think I
15 ruled appropriately at the time with regard to this document,
16 because I don't think they were in a position at that point in
17 time to authenticate that document. And there was a genuine
18 dispute about what was the accurate document. And they may
19 have to be put to the burden of demonstrating that.

20 But I don't understand your argument that if they
21 bring, if I issue a subpoena and the company checks its files
22 and in its files they pull out this document, and somebody says
23 yes, this document was created, and what we do is when somebody
24 asks us for information, we create a spreadsheet, and we
25 provide that information and then we put that record in our

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1 files in case you have to retrieve it again some other later
2 time or somebody else requests it and we keep it in the regular
3 course of business.

4 Is this document dated as to when it was created?

5 MR. ROOS: The final version is in 2020.

6 THE COURT: They created that document at that time.

7 Right?

8 MR. ROOS: Yes.

9 THE COURT: So, the question is whether or not that
10 document was created at or about the time that the document
11 says it was created. Right? Not at or about the time as to
12 each company.

13 MR. ROOS: We obviously disagree so I don't want --

14 THE COURT: I'm trying to understand. I am not here
15 to disagree with you. I am trying to understand your argument.
16 I don't understand your argument about why -- I understand your
17 argument that they have not yet established its admissibility.
18 I don't understand your argument that simply because the
19 government requested the information, that when they created
20 the spreadsheet, took one copy, put it in their files, took
21 another copy and gave it to you, that that somehow makes it not
22 a business record. It may be an inaccurate business record.
23 But that's for you guys to fight about.

24 But I don't understand if they can establish that it's
25 in the files of RDC, that somehow it's not a business record

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1 because it was created in response to your requests for
2 information.

3 MR. ROOS: I think the point about it being created in
4 response to our request is not so much why the document was
5 created. But the fact that the underlying facts in the
6 document are not, as the business record rule requires, logged
7 in real time.

8 THE COURT: That's true about the 278.

9 MR. ROOS: No, it's not. Because those, her testimony
10 is we did log them at the time we were doing the terminations.

11 THE COURT: Not on that document.

12 MR. ROOS: On other versions she pulled together in
13 the document.

14 THE COURT: She created a document. The document in
15 evidence is not the underlying documentation. It is the
16 document she created. So the rule is not that it's
17 inadmissible unless she created it on the date as reflected as
18 to each termination of each company. That's not the rule. The
19 rule is, is this document, this compilation, is that
20 admissible. And the rule that you ask yourself was this
21 created at or about the time that it says it was created on the
22 document. And it has a single date when she created that
23 document. And she testified appropriately that, yes, that
24 document was created at that time and we put it in our files
25 and we kept it in our files.

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1 Now, I assume that if there is testimony with regard
2 to the other document, that whatever date is on the other
3 document, that that document was created at that time, and that
4 document was put in the files, regardless of who else got the
5 document, the government or anybody else. If that document was
6 created at that time, and that was put in the file, I don't
7 understand your argument that it's not a business record.

8 MR. ROOS: I think the difference is when the
9 underlying data was logged on it. If it was logged when the
10 event happened versus whether it was logged after the fact.

11 THE COURT: If you ask me to give you a document that
12 shows every day that I logged into the courthouse, and I say to
13 you, well, there is no such one document, but we have that
14 underlying information, and what I'll do is I'll pull that
15 together and I'll create a list and I'll give you that
16 document. And our procedure is, if I create that document, I
17 do it in the regular course of business, and I'm supposed to
18 put that document in our files. So, if they put that document
19 in their files, you can't argue that it's inadmissible because
20 it said that I logged in on January 23 of 2004, but this
21 compilation wasn't created on that date.

22 MR. ROOS: So I agree with you on that example. But I
23 think the question is, well, how are you making that log of
24 when you logged in. If you're going to the courthouse and you
25 are saying give me the swipe cards, that's a computer system

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1 that logs when they happen.

2 THE COURT: No, but that's not the exhibit. The
3 question is, what is the business record, what is the record.
4 Let's take out the business. What is the record in dispute.
5 The record in dispute is that compilation.

6 MR. ROOS: And the underlying data in it.

7 THE COURT: No, no, no. The record in dispute.

8 MR. ROOS: Double hearsay.

9 THE COURT: No, you can't argue double hearsay. You
10 already got your document in evidence. You're arguing against
11 your own document if you argue it's double hearsay.

12 MR. ROOS: Both are business records in the government
13 exhibit.

14 THE COURT: Why is the one they created for you that
15 you want a business record, but the one they created for you
16 that you don't want is not a business record?

17 MR. ROOS: The one that's in is like every time you
18 swipe your card, every time that was happening, they were
19 logging it. Versus the one that's out, is like there are no
20 key swipes, so instead, I am going to look --

21 THE COURT: What does that have to do with whether or
22 not the exhibit itself is a business record? That has nothing
23 to do with the business record. Let's take it out of business
24 record. The record is that compilation. That is the record,
25 you didn't put in the underlying -- we are not fighting about

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1 the underlying information that created that compilation. It
2 is just like we are talking about Exhibit 903 with this
3 witness. Exhibit 903 is an exhibit. It doesn't matter when he
4 looked at this information or when this information was logged
5 in, because he created a document.

6 MR. ROOS: Sure.

7 THE COURT: So they created a document, and they
8 didn't create a document that Ms. Pompeo could take home and
9 put in her desk drawer. They created a document that had to do
10 with the business of RDC, and it was her responsibility in the
11 regular course of that business to create that document at the
12 time it was requested, and to give a copy to the government,
13 and then put another copy of that document in their files, and
14 to keep it in their files as a regular business record. I
15 don't understand, I just -- we can end this, but I'm not
16 debating with you, I don't understand your argument. If I do
17 understand your argument, you're right, we disagree. If your
18 argument is simply because she created that exhibit on a
19 certain date, and that exhibit reflects other dates, unless she
20 can prove that she created the document on the dates where the
21 exhibits reflect that the terminations happened that doesn't
22 qualify as a business record because she created at a later
23 time. No, the business record is that document. The business
24 record is not the underlying documents that she used to create
25 it. That's not the exhibit that you offered in evidence. You

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1 offered an exhibit that you say -- and it is up to the jury to
2 determine if that's accurate. She said she created it, you
3 laid the proper foundation, she put it into evidence. If they
4 are going to argue that you should ignore it because it's not
5 accurate, they can argue that, even though if it's in evidence.

6 But I just don't understand what is the difference.
7 The only difference between the document they want and the
8 document that you put in evidence is that you don't like what
9 their document says. That's the only difference. They were
10 both -- so if you tell me, let's put it this way. If they were
11 both created on the same date, all right. Let's say they were
12 created, let's say they were created last week, they were both
13 created last week. She gave you, because you asked her for
14 that information. She says to you, here, here's one document.
15 And then she says, oh, I'm sorry, I made a mistake. Here's a
16 document with different information. Then she puts both of
17 those in her file. How is it that one of them is a business
18 record, and the other one is not?

19 MR. ROOS: I think the question of whether it is a
20 business record has to do with what's the data on each of those
21 things. Not the fact that she threw it in her drawer.

22 THE COURT: No. The thing that makes it a business
23 record is it was created at the time it's represented that that
24 exhibit was created, and it was kept in the regular course of
25 business after she created it on that date. So, what you

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1 asked, you say if you want to establish it as a business
2 record, what you say is, you ask the witness, Did you create
3 this document? Yes. Did you create this document in the
4 regular course of business when it was requested by the
5 government that you give them the information? Yes, I did.
6 When you created this document, is this the kind of document
7 that you would store in your files and keep as a business
8 record? Yes, it is. Did you in fact put this document,
9 exhibit whatever it is, put this document in your files and
10 keep it there until you were asked to retrieve it at this
11 trial? Yes, I did.

12 What else is requested?

13 MR. ROOS: I just think there is an additional step
14 there, otherwise every single record that a business keeps is a
15 business record. Every e-mail, every document, every court
16 file.

17 THE COURT: No, no. Every e-mail, every document that
18 is their routine practice to file those, and keep those, are
19 business records.

20 MR. ROOS: If they archive them?

21 THE COURT: Sure. You think it is not a business
22 record if they keep it in their files, if I go to their records
23 and I say do you have e-mail X, and they say, oh, yeah, we keep
24 all e-mails and we keep them in the regular course of business
25 in case there is a problem later and we need to check the

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1 e-mails. We got a whole file of e-mails, which one do you
2 want.

3 You don't think those are business records?

4 MR. ROOS: I don't. But, your Honor --

5 THE COURT: I don't know why, I don't understand that
6 argument.

7 MR. ROOS: Your Honor, I don't want to waste the
8 jury's time. Two proposal on this. One is, I think they are
9 not intending to offer this until their defense case. And so,
10 we can put in a brief --

11 MR. JANEY: Well --

12 THE COURT: I am ready to issue the subpoena for them.

13 MR. ROOS: Here he is the thing though. I don't
14 think, I don't think we need the subpoena. Because --

15 MR. GOTTLIEB: We want the subpoena.

16 MR. ROOS: If your Honor thinks the document is
17 admissible, we all have the document.

18 THE COURT: No. I don't say the document is
19 admissible. I say that it appears to me that they have the
20 information to establish its admissibility. They have not yet
21 established its -- their question is are you going to force
22 them to go through the process to get somebody from the company
23 to come and say they retrieved this document out of their
24 files, that they keep it in the regular course of business,
25 this isn't their personal document, and therefore make it

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1 admissible. You say you don't want to concede it's admissible,
2 so they'll have to prove it. If they can prove it, fine. If
3 they can't prove it, then that's their problem.

4 I'm not saying in advance. I am just saying that I
5 don't understand why you say that they are in a position that
6 they cannot establish this document is a business record, when
7 you've already established the other document's admissible.
8 Which is pretty much the same document that was handled the
9 same way and came from exactly the same source.

10 MR. JANEY: Your Honor, if I can raise a related issue
11 not having to do with the subpoena. But I'll be very brief.

12 MR. ROOS: If I can just finish with this thought.
13 So, your Honor, I don't think if what the defense's plan is to
14 call the IT record custodian for RDC, and have him say this is
15 on our server or whatever, like, that does not need to happen.
16 If your Honor believes it is a business record, and it's coming
17 in as a business record and there is no other objection that
18 applies, we'll just stip it in. We don't need to unnecessarily
19 call another witness.

20 THE COURT: I only say it is a business record if I
21 think that they can establish the elements of a business
22 record. If you want to concede it, then concede it. But,
23 there is no ifs here. You don't say I am going to give them X,
24 Judge, if you rule in their favor. You make your decision
25 first, and then I make my ruling. Are you going to fight this

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1 or not fight this.

2 MR. ROOS: I want to confer with the rest of the team.
3 Maybe this recommendation. If your Honor signs the subpoena
4 during break, I'll talk to Mr. Gottlieb. Maybe we can work out
5 a stipulation on this, based on how your Honor has indicated
6 this. I do think --

7 THE COURT: If you can think you can convince me and
8 you can overcome what seems to me to be a routine argument
9 about a record that's in the business records of the company,
10 and if somebody pulls it out and shows up here and said we got
11 a subpoena, I don't know anything about this case, but I went
12 to our records and this was in our records and it is going to
13 stay in our records and I produced it and this is the kind of
14 document we put in the file, that's why it's in the file. And
15 we keep it in case somebody wants the information. And this is
16 the information in the file. If they say that, which is pretty
17 much the basis for the document that you already have in
18 evidence, if they say that, then it seems to me that I'm not
19 sure what your argument is that it's not a business record, if
20 some custodian of records comes in and brings the document and
21 says I don't know anything about this document, I just know
22 it's in our files and I retrieved it.

23 MR. ROOS: I think the other issue though, your Honor,
24 is the inaccuracies in the document.

25 THE COURT: That's a dispute among the parties. How

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1 you want to explain the inaccuracies in the document, or point
2 out and explain the inaccuracies in the document, is not the
3 issue with regard to its admissibility. The document you may
4 have in evidence, their contention is that's not accurate. I
5 don't know which one is accurate, and whether it's accurate or
6 not does not go to the issue of its admissibility. It goes to
7 the issue of its weight and its relevance and the purpose for
8 which the jury can legitimately establish that. So, if you
9 think it is inaccurate, and you have a good faith basis to
10 believe that, then you should point that out to the jury and
11 let them come to the same reasonable rational conclusion that
12 you come to.

13 But I can't tell you that, in my view, I know which
14 one is accurate and which one is inaccurate. I don't know how
15 you know that. Pompeo didn't say, oh, this one is right, but
16 yeah, I looked at this one and this one is wrong. That's not
17 what she said. So, you think it's inaccurate. You hope it's
18 inaccurate. But that doesn't make it inaccurate. It makes it
19 a dispute. Because they say, well, look, you got two different
20 documents that say two different things, and the government
21 wants you to rely on the document they think is favorable to
22 you, and they don't want you to see the document that's
23 unfavorable to you.

24 MR. ROOS: That's what I'm worried about also. It is
25 going to come in and they are going to make these arguments in

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1 closing this is what the government hid from you.

2 THE COURT: They can't make that argument. And I
3 would preclude them from making that argument. I will admonish
4 them right in front of this jury if they attempt to make that
5 argument. Motives or the tactics of the lawyers is not at
6 issue here. The question is, is whether or not the information
7 on the document that the government submitted in evidence is
8 accurate and something the jury should rely on as truthful.
9 They say it is inaccurate. They say they have another
10 document, and, quite frankly, this is not a surprise to this
11 jury. It's clear that Mr. Gottlieb has already asked questions
12 of the witness implying that and indicating to the jury that he
13 has seen a document and he has a document that has different
14 information on it than the document that the government has.
15 So, that's a dispute. How either one of you can prove your
16 point is a different issue.

17 But, my only issue is whether or not the document
18 itself is going to come into evidence. I will issue the
19 subpoena. If they get the information in enough time, maybe
20 they can use it. We are not going to delay this trial for
21 this, because this is something, quite frankly, that should
22 have been addressed long before this point in time. So, to say
23 we are going to subpoena the document for the last day of
24 trial, I don't think that's necessarily timely. If they can
25 get the document and the company is ready to hand it over as

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1 soon as they see the subpoena, let them hand it over. And they
2 can decide once they get the document in their hands, if you
3 want to make further argument about why it shouldn't be in,
4 then I'll hear you. Or if you want to say, well, it's not
5 worth fighting about, because I'm not going to convince the
6 judge, then you can agree to put it in.

7 I'm perfectly willing to be convinced of your position
8 if you have a reasonable rational basis to make that argument.

9 MR. ROOS: Okay. I don't want to take more of the
10 Court's time on the subpoena.

11 THE COURT: Mr. Janey.

12 MR. JANEY: If I can, just in particular, given the
13 government's comments about the errors or inaccuracies of the
14 particular document that we're seeking by way of the subpoena.
15 It has implications for the witness that is currently
16 testifying. The slide number 18, which I believe your Honor
17 has with respect to Exhibit 903, has a time frame of 2012 to
18 2016 on it. It says it relies on a document Government Exhibit
19 278.

20 THE COURT: That's not my issue at this point.

21 MR. JANEY: I understand.

22 THE COURT: Whatever proper questions that you can ask
23 this witness about the information that this witness relied
24 upon, and about what was in front of this witness when he put
25 together his chart, if they are relevant questions, then you

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1 can ask that. But obviously, you are not in a position at this
2 point to display this document to the jury or to read off this
3 document.

4 MR. JANEY: Understood, your Honor. I understand that
5 fully.

6 THE COURT: So whatever you want to ask this witness
7 about, what information this witness relied upon, if it's a
8 proper question, and a relevant inquiry, then you have it.
9 But, obviously your inquiry at this point is limited, and
10 because you don't have the document in evidence, so you don't
11 have the document to display to the jury and go through with
12 this witness.

13 MR. JANEY: No, but do I believe along those lines, at
14 least in my way of thinking, your Honor, that I have the right
15 on cross-examination to ask the witness to show me the document
16 he relied on.

17 THE COURT: That's fine. Well, you have the right to
18 ask the witness whether or not he relied on the document in
19 evidence or whether or not there was some other document he
20 relied on. You don't have the right to ask him about the
21 document that is not in evidence.

22 MR. JANEY: Understood.

23 THE COURT: Let's be clear about that.

24 Did you have something did you want to raise?

25 MR. BURNETT: No. I think Mr. Janey's misreading the

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1 chart and we'll have him point out as part of his direct what
2 documents he relied on.

3 MR. GOTTLIEB: Just so we end this discussion of
4 subpoenas, there is that second subpoena with regard to the
5 amount of the legal fees. If you recall, the government
6 introduced in evidence legal work performed by Larry Houck in
7 reviewing the compliance program and his recommendations. And
8 we simply have asked for the dollar amount, how much was paid
9 by RDC for the review of its compliance. We've also been in
10 touch with that law firm. They're prepared to provide that
11 information, but they requested a subpoena.

12 THE COURT: All right. Well, at this point I'm not
13 going to rule on whether or not this is admissible or relevant
14 to anything at this point. Unless there is some objection to
15 my issuing the subpoena, I'll issue the subpoena. If they want
16 to respond, if they say no, we are not going to give you that
17 information, then you come back to me and tell me that. If
18 they say yes, you can have that information, once you have it
19 in hand, then we can debate about whether or not it's
20 admissible, and how it's admissible and what relevance it has
21 to the issues before the jury, as to whether or not the
22 defendant was involved in a conspiracy to distribute drugs or
23 involved in a conspiracy to defraud the DEA.

24 And I'm not sure how the amount of money they paid the
25 lawyers advances that inquiry. But, you can make that argument

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1 once you have reviewed the documents if you determine that the
2 documents help prove your point.

3 MR. GOTTLIEB: Thank you.

4 MR. ROOS: We also the same relevancy questions, but
5 have no objection to your Honor issuing the subpoena and we ask
6 for a copy of whatever they get back.

7 THE COURT: At this point, let's finish up the
8 government's case today. I'll hear your motions, Mr. Gottlieb.
9 It's likely anyway I'll give you an extended period of time to
10 argue that motion orally or in writing. I'll probably reserve
11 decision on that motion so we can move forward. And then I
12 would hope that we could move forward, put in all the witnesses
13 tomorrow. If we can, as soon as you know that, let me know, so
14 I can tell that to the jury that they don't have to be here
15 until Monday. If not, if we have to either consider just doing
16 an hour tomorrow and not doing Friday, or doing a half a day
17 Friday, or doing an hour on Monday, I want to be able to at
18 least inform the jury, particularly in light of what is
19 anticipated is a nor'easter Friday night, Saturday.

20 MR. JANEY: Is it possible we let you know after the
21 lunch break, just given the time now?

22 THE COURT: All right.

23 MR. JANEY: We have to make a telephone call.

24 THE COURT: Okay. How much more do you have with this
25 witness?

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1 MR. ROOS: Probably about an hour and a half. Could
2 be less. Something like that.

3 THE COURT: All right.

4 MR. ROOS: I might be wrong.

5 THE COURT: How long are we going to be on cross with
6 this witness?

7 MR. JANEY: Probably about 45 minutes, your Honor.

8 THE COURT: All right. So let's see if we can finish
9 this witness before lunch. And do you anticipate one more
10 witness after that?

11 MR. JANEY: It's Paulsen, who is a short witness, and
12 then a paralegal.

13 THE COURT: Those two witnesses, hopefully we can do
14 those two this afternoon.

15 MR. ROOS: That should not be a problem. We have some
16 questions about the defense witnesses, but given the time maybe
17 we'll just do them at the end of the day.

18 THE COURT: Sure. We can do that later. Let's get
19 the jury. The exhibit that's already in evidence that we were
20 talking about is 278? And the exhibit that you want?

21 MR. GOTTLIEB: Defense A82.

22 THE COURT: All right. Let me see if I have it.

23 You can bring the witness back.

24 Bring in the jury, please.

25 (Jury present)

Mlq3doul

Cutler - Direct

1 THE COURT: Seems like every day I am apologizing for
2 the delay. But I want to tell you that the hour that we spent
3 while you were waiting I think has saved us a day. And I think
4 we move up earlier, we will probably be finished with the
5 witnesses no later than Monday. And so, remember, if I'm
6 dealing with issues that don't concern you, it usually either
7 has to do with scheduling of witnesses or resolving legal
8 disputes that don't involve you, so we don't have to keep going
9 back and forth. So I think that we are going to try to see if
10 we can finish up the witnesses -- I don't want to say on what
11 schedule at this point.

12 I know that some weather conditions may be coming this
13 weekend, so I am going to see how soon we can get in all the
14 witnesses, whether we have to sit on Friday a full day or part
15 of the day, or not at all. And whether or not we can still be
16 in a position to finish the witnesses no later than Monday.
17 All right? So that's where we are.

18 So, we'll turn to the government. You can continue,
19 Mr. Burnett.

20 MR. BURNETT: Thank you, your Honor.

21 DAVID CUTLER,

22 called as a witness by the Government,

23 having been previously sworn, testified as follows:

24 DIRECT EXAMINATION (Continued)

25 BY MR. BURNETT:

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Cutler - Direct

1 Q. Good morning, Professor Cutler.

2 A. Good morning.

3 Q. I'd like to begin with Exhibit 903 with slide -- sorry.

4 903 on slide number eight.

5 This is a slide that you've testified about already,
6 correct?

7 A. That's correct.

8 Q. I just want to recap to start out today, can you use this
9 chart to explain the total amount of revenue that RDC received
10 from opioid sales between 2012 and 2016?

11 A. Yes, you see those in the left-hand side chart. For the
12 years 2012 to 2016 are the five bars to the right of the
13 left-hand chart. And then the dark blue down at the bottom is
14 the revenue from opioids.

15 So that's 44.8 million in 2012, rising up to 241.8
16 million in 2015, and then declining to 167.5 million in 2016.

17 Q. So putting you on the spot with a little mental math.
18 About how much money over the course of those five years?

19 A. It would be about 500 million, 600 million.

20 Q. Now, these charts you were looking at yesterday, they
21 separate opioid revenues from other revenues; is that right?

22 A. That's correct. The light gray area on top of that is
23 non-opioid revenue.

24 Q. Now, is that because it's right as an economic matter to
25 treat controlled substance sales and non-controlled substance

Mlq3doul

Cutler - Direct

1 sales completely independent of one another?

2 A. No. As we were talking about yesterday, RDC is a full
3 service distributor. So, part of a full service distributor is
4 they will sell both opioids and non-opioids, and in fact, a
5 benefit of being a company that sells opioids is that it also
6 makes some pharmacies more likely to buy all of their products,
7 include the non-opioid products from RDC.

8 Q. Let's take this slide down for the time being.

9 I want to turn away from sales data and ask you a
10 little bit about Mr. Doud. Are you familiar with what his role
11 was at RDC?

12 A. Yes, he was the CEO.

13 Q. What, if anything, have you reviewed in this case about
14 Mr. Doud's employment at the company?

15 A. I've reviewed his employment contracts.

16 Q. In your work as an economist, have you looked at employment
17 contracts for people?

18 A. Yes, I have.

19 Q. Why do economists look at that type of thing?

20 A. We want to understand what are the amounts of payment, and
21 what are the incentives operating, that is, how would an
22 individual increase, if at all, the money that they received.

23 Q. At a high level, could you explain for the jury what, if
24 any, economic incentives were in the defendant's contracts when
25 he was the CEO at RDC?

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Cutler - Direct

1 A. So, the defendant's compensation had two forms. First
2 there was a salary, which increased a little bit over time, but
3 was a relatively constant number. And then second there was a
4 bonus. And the bonus was on top of the salary, and the bonus
5 was -- had a couple of parts, but it was related to what was in
6 essence the profit of the company. So the greater the profit,
7 the greater the bonus for the defendant.

8 Q. Now, let's explore that in more detail. I want to show you
9 what's already in evidence and the parties have stipulated is
10 one of Mr. Doud's employment contracts, which is Government
11 Exhibit 270.

12 Have you seen this document before?

13 A. Yes, I have.

14 Q. Do you see it says "employment agreement" at the top there?

15 A. Yes, I do.

16 Q. Looking at that first paragraph, who is this an employment
17 agreement between?

18 A. This is an employment agreement between Rochester Drug
19 Co-Operative, RDC, and the defendant, Mr. Doud.

20 Q. What time period does this --

21 THE COURT: Let me interrupt you for a second. If you
22 can pull back just a little bit.

23 THE WITNESS: My apologies, your Honor.

24 THE COURT: It's okay. You can continue.

25 MR. BURNETT: Thank you, your Honor.

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Cutler - Direct

1 Q. What time period does this contract cover?

2 A. This covers the period from 2014, April of 2014, through
3 the end of 2019. Excuse me. Through the end of March 2019.

4 Q. If you could go to the next page, please. I want to take a
5 look at section four. Do you see that section is titled
6 "compensation"?

7 A. Yes, I do.

8 Q. Have you reviewed that section of the contract?

9 A. Yes, I have.

10 Q. Let's start by looking at Subsection A that says "annual
11 base compensation."

12 What is in that section of the contract?

13 A. Yeah. So we are talking about how there was a salary
14 payment and then there was a bonus payment. So the annual base
15 compensation is the salary part of that.

16 (Continued on next page)

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Cutler - Direct

1 Q. Do you see there's a subsection B titled annual bonus?

2 A. Yes.

3 Q. If you could flip to the third page, please. You see that
4 continues over?

5 A. Yes, I do.

6 Q. What part of the contract is that?

7 A. That is the bonus part of the contract.

8 Q. Thank you. Going back to page 2. What are the parts of
9 the bonus under this contract?

10 A. There are two parts to the bonus, although they tend to
11 work very synergistically. The first part is 2 1/2 percent of
12 the adjusted net earnings, and that's a number like the
13 profits, so that 2 1/2 percent of the profits is the first part
14 of the bonus.

15 Then the second part of the bonus, which is on the top
16 of page 3, is 1 percent of the net cash provided, and the net
17 cash is defined as very similar to the adjusted net earnings
18 differing by a very small amount. So effectively it's like
19 3 1/2 percent of the net earnings of the company are the bonus
20 paid to Mr. Doud.

21 Q. Going back to page 2. Could you please zoom in from
22 subsection B to the end of this page.

23 Do you see there's a description here of annual
24 adjusted net earnings?

25 A. Yes.

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1 Q. Could you read what the definition is of that term?

2 A. RDC's annual adjusted net earnings for Doud's annual bonus
3 compensation as used herein shall mean the amount calculated
4 annually as follows: The amount of RDC's annual net earnings
5 before one patronage dividends and federal and state income
6 taxes per RDC's annual audited financial statements
7 consistently prepared by the certified public accountants then
8 servicing RDC.

9 Q. You see that it says patronage dividend in there?

10 A. Yes.

11 Q. Are you familiar with what that term means in the context
12 of RDC?

13 A. Well, RDC is a cooperative, so it's owned by the members
14 and so the patronage dividend is kind of the payment to the
15 members who own it, in the same way that if there were
16 shareholders, there would be payments through dividends to the
17 shareholders, so it's a comparable type of payment there.

18 Q. And according to this contract, is Mr. Doud's bonus
19 calculated on profits before that dividend is paid?

20 A. That's correct. So his bonus is calculated on the profits
21 before the dividend and the taxes.

22 Q. So I want to take a look at how this bonus operates, and we
23 could turn to the second to last page of this contract.

24 What's this?

25 A. This is the earning statement for RDC showing you how you

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1 go from the revenues down to the profits of the company, and
2 this is going to indicate how one gets to Mr. Doud's bonus.

3 Q. From your work as an economist are you familiar with
4 reading consolidated earnings statements like this?

5 A. Yes, I am.

6 Q. Using this statement, could you please identify on this
7 statement what the line item is where Mr. Doud's bonus is
8 calculated from?

9 A. You see about two-thirds of the way down, there's the
10 earnings before patronage dividend and income tax, which in
11 2013 is the number \$15,084,763. That's exactly the number,
12 that's the net earnings before the patronage dividend and the
13 income tax.

14 Q. And the information below that, what's that?

15 A. That's the amount that's paid out after that. So there's
16 the federal income tax, the state income tax and then the
17 patronage dividend.

18 Q. And so under Mr. Doud's contract, is it 2 1/2 percent of
19 that earnings before patronage dividend and income tax that
20 makes up the first piece of the bonus?

21 A. That's correct. So if this was for a year under that
22 contract, it would be 2 1/2 percent of that \$15 million.

23 Q. Using this chart here, could you explain what factors go
24 into getting to that earnings before patronage dividend and
25 income tax number?

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1 A. Yes. So the first line is the net sales that the total
2 revenue that we were looking at yesterday and --

3 THE COURT: I'm not sure the jury can see all of this.
4 If you can highlight or increase that size.

5 MR. BURNETT: Thank you, your Honor.

6 A. So the net sales is the total revenue. The next row is the
7 cost of the goods sold, so that's the cost of the
8 pharmaceuticals and other items purchased from the
9 manufacturers, so the difference between those is in the third
10 line which is called the gross profit on net sales. And then
11 out of that come all of the subsequent items which are the cost
12 of running RDC as a business, the selling general
13 administrative, depreciation, interest, all of that goes into
14 those next rows. They're subtracted out, and then you get the
15 earnings before patronage dividend and income taxes.

16 Q. Does this chart also show what RDC's profit margin is at
17 different points in calculation?

18 A. Yes, it does. You see that in the column just to the right
19 of the dollars, so there's the amount and then there's the
20 profit margin which is what percent of sales is each of these
21 items.

22 Q. So according to this chart, what's the gross profit --
23 what's the profit margin on the gross profit on net sales?

24 A. If you look, that's in the third row there, so that's gross
25 profit on net sales, it's \$31 million in 2013, which is 3.71

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percent of net sales.

Q. Thinking about the calculation you just described, how if at all is this first part of Mr. Doud's bonus based on the amount that RDC sales?

A. The first part is going to be based on the total amount of earnings net of the cost, so it's going to be based on the total of the 15 million, which includes the revenues from all sales net of the costs.

Q. So does Mr. Doud's bonus depends exclusively on the sales of controlled substances?

A. No, it does not depend exclusively on the sales of controlled substance.

Q. So how, if at all, does the sales of controlled substances affect Mr. Doud's bonus?

A. It effects it in two ways. The first way is because sales of controlled substances do add to profit, so any profit from those comes down into the earnings before the patronage dividend and income taxes, and then part of that shows up as compensation for the defendant. That's the first way.

And the second way, remember we were talking about RDC being a full service distributor, and so any amount by which the total business increases as RDC supplies opioids, all of the profit from the business that it gets implicitly because of the selling of the controlled substances, that shows up as earnings to and net earnings and translates into the

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1 compensation.

2 Q. Let's go back now to page 3 of Mr. Doud's contract. I
3 think you mentioned at the top of this page there's the second
4 piece of Mr. Doud's bonus?

5 A. That's correct. That's the 1 percent on the net cash.

6 Q. Can you describe how that work?

7 A. There's a separate statement called a cash flow statement.
8 It's close to the net earnings statement for a business like
9 RDC, and so 1 percent of the net cash is also a part of the
10 bonus for Mr. Doud.

11 Q. So how, if at all, does that second part of Mr. Doud's
12 bonus depend on the amount that RDC sales?

13 A. The same way. The more that RDC sales net of what it
14 costs, the greater is the net income, the greater is the net
15 cash to RDC, and therefore the greater is the bonus.

16 Q. And again, what, if any, impact does the sale of controlled
17 substances have on that second piece of the bonus?

18 A. The same two ways. First, directly because the sale of
19 controlled substances contributes to cash, net cash for RDC,
20 and therefore that's a part of the compensation; and then also
21 because the sale of controlled substances allows the company as
22 a whole to have more business. And to the extent that that
23 business brings in additional net cash to the company, that
24 contributes to the bonus to the defendant.

25 Q. Now, the contract you've been looking at I think you said

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covers April 2014 through March 2019; is that right?

A. That's correct.

Q. Have you reviewed a contract for prior set of years?

A. Yes, I have.

MR. BURNETT: And if we could publish please for the jury Government Exhibit 269 which is also already in evidence.

Q. What's this?

A. This is a prior employment agreement dating from April 2005 up through the period where the subsequent employment agreement was in effect.

Q. Have you reviewed the compensation provision in this contract?

A. Yes, I have.

Q. So without going through step by step like we did for the last contract, could you describe how, if at all, the defendant's bonuses in this agreement compare to the bonuses in the other agreement that you just analyzed?

A. The bonus here is somewhat smaller and the bonus in this case is 2 percent of the adjusted net earnings. So remember last time there was 2 1/2 percent of adjusted net earnings plus the 1 percent of the net cash, this is just 2 percent of the net earnings.

Q. Is it based on the same underlying set of inputs, the bonus in this contract?

A. That's correct. It's based on the same inputs as the 2 1/2

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1 percent was in the prior contract -- or in the subsequent
2 contract, excuse me.

3 Q. Have you identified the amount that the defendant was paid
4 at certain points during his tenure?

5 A. Yes, I have.

6 Q. Let's go back to Government Exhibit 903 and turn to page
7 10, please. What's on this slide here?

8 A. This slide is the total compensation of the defendant in
9 each year from 2009 to 2017. It's divided into two parts, so
10 the blue at the bottom is the salary payment and the orange
11 just above, that is the bonus payment.

12 Q. Let's take a look at an example starting in 2012. Can you
13 describe what this shows about Mr. Doud's compensation that
14 year?

15 A. Yes. So Mr. Doud's total compensation in 2016 was \$664,
16 660. That's the number that you see on the top of that bar.
17 Just about half of that, 45 percent of that, so about \$250,000
18 was the salary payment, and then 55 percent of that, the rest,
19 probably about \$300,000 was the bonus payment.

20 Q. How about in 2015?

21 A. In 2015 the total compensation was 1,502,320. You can see
22 that the salary part had grown a little, but the primary
23 increase in total compensation which was about 900,000, the
24 vast bulk of that was from the increase in the bonus.

25 Q. Looking across this entire chart from 2009 through 2017,

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1 could you describe what this shows about how the defendant's
2 compensation changed over that time period?

3 A. Yes. So the defendant's compensation increased quite a
4 lot. So between, for example, 2009 and 2015 and 2016, it
5 increased roughly by four, so it rose by a factor of four. The
6 vast bulk of which was the increase in the bonus payments.

7 Q. What, if any, relationship to those bonuses have to RDC's
8 sales?

9 A. The bonuses are related to the total net cash, so the total
10 income net of the cost of running the business.

11 Q. Have you analyzed, what, if any, portion of the defendant's
12 bonuses over these years were attributable to sales of
13 controlled substances?

14 A. Yes, I have done that direct part, so we're talking about
15 the two different parts. I've done the direct, which is how
16 much would have come directly from the sales of controlled
17 substances.

18 Q. Now, were you able to precisely determine how much came
19 from sales of controlled substances?

20 A. Not precisely because you would need to know exactly the
21 profit rate from the controlled substances relative to all the
22 other products that RDC was selling.

23 Q. So what did you do to come to an estimate of the amount
24 that's directly attributable to controlled substances?

25 A. The data from the company suggest that the profit rate was

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1 roughly the same for controlled substances as non-controlled
2 substances. That is the profit rate was the same. In which
3 case, then the bonuses is effectively what percent of the total
4 sales are controlled substances because the profits from each
5 one are about the same.

6 So I earn \$10 out of every 100 is profit, therefore, I
7 just need to say how big was the money from the controlled
8 substances, how big was the money from the non-controlled
9 substances.

10 Q. Let's take a look now at slide 11. What's on this slide?

11 A. This is my estimate of the amount of bonus for the
12 defendant that came directly from the sales of controlled
13 substances.

14 Again, this is from the net revenue from those
15 controlled substances sales.

16 Q. Let's start towards the beginning of this chart. According
17 to your calculations, approximately how much of the defendant's
18 bonuses between 2009 and 2011 were attributable directly to
19 controlled substances?

20 A. Here it's about \$60,000 between 2009 and 2011 which would
21 have come directly from the sale of controlled substances.

22 Q. How did that change during the period between 2012 and
23 2017?

24 A. You can see that that grew quite a lot. So in 2012 it was
25 36, 521. At the peak in 2015, it was 163, 535 before declining

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1 to 90, 941 in 2017.

2 Q. Again putting you on the spot a bit for some mental math.
3 Between 2012 and 2017 according to this chart, approximately
4 how much in total did the defendant make in bonuses directly
5 related to the sales of controlled substances?

6 A. Somewhere around \$550 or \$600,000.

7 Q. Does this chart show the full impact that the sale of
8 controlled substances had on Mr. Doud's bonuses?

9 A. No, it doesn't.

10 Q. Why not?

11 A. Remember we were talking about those two parts, so there's
12 the direct part which is the net revenue from the controlled
13 substances, and then there's the fact that selling the
14 controlled substances was a part of being a full service
15 pharmacy -- a full service distributor, and therefore it
16 brought in potentially more business to the company as a whole,
17 and that additional business brought in would have also
18 contributed to the bonus payments.

19 Q. I want to turn away from this topic now and switch over
20 back to RDC's sales of controlled substances including opioids.

21 Based on your work for this case, have you reviewed
22 any written policies that RDC had for monitoring the sales of
23 controlled substances?

24 A. Yes, I have.

25 Q. Just to orient ourselves, could we please look at

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1 Government Exhibit 276 which is already in evidence. Have you
2 seen this before?

3 A. Yes, I have.

4 Q. What is it?

5 A. This is the due diligence and suspicious order monitoring
6 policies and procedures.

7 Q. Let's turn ahead to section 8 which is on page 6. Have you
8 seen section 8 before?

9 A. Yes, I have.

10 Q. What is it?

11 A. This is how one defines an order of interest, so what does
12 it mean for an order that comes in from a pharmacy to be an
13 order of interest or a suspicious order.

14 Q. Do you see one of the subsections, subsection A is titled
15 purchase thresholds?

16 A. Yes, I do see that.

17 Q. Could you describe in general terms what's in this
18 subsection?

19 A. One way to determine whether an order is an order of
20 interest is to say was the amount that was ordered greater than
21 some average of past orders or past shipments.

22 So they would look at the past years worth of
23 shipment, average those, and then bump them up by roughly 50
24 percent. And say any order that's above 50 percent over that
25 average of past years is an order of interest, so that's

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1 roughly what's going on here.

2 Q. From your work on this case, have you analyzed data that
3 was generated from this threshold based order of interest
4 system that RDC had?

5 A. Yes, I have.

6 Q. What did you do with that data?

7 A. I did a couple of things. One is, I look to see how common
8 they were, that is how frequent were the orders of interest
9 that came from the thresholds; and then second what happened,
10 that is, were the shipments made, were they not made, were they
11 reported to the DEA, what happened to them.

12 Q. On the high level, what did you find from that analysis?

13 A. The vast bulk of the orders that exceeded the orders of
14 interest were shipped to the pharmacy, well over 90 percent
15 were shipped to the pharmacy.

16 Q. Now before we go further into this, I just want to make
17 something clear, have you analyzed what, if anything, RDC did
18 to investigate before shipping orders of interest?

19 A. No, I haven't.

20 Q. Why didn't you do that investigation?

21 A. There are people in the company who will know much more
22 about that, so that was not asked of me because I'm an outsider
23 looking at what happened in the company, and that's a much
24 better question for the people in the company to say what
25 happened.

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1 Q. Let's turn back to Government Exhibit 903 and take a look
2 at slide I believe it's 12. What's the data that's chartered
3 out here on this slide?

4 A. This is showing you the orders of interest, how many orders
5 of interest there were in each quarter and then what happened
6 after it became an order of interest.

7 Q. So let's take one bar, let's say the first quarter of 2015
8 as an example. Do you see the bar there?

9 A. Yes, I do.

10 Q. According to this chart, approximately how many orders of
11 interest for controlled substances did RDC receive in the first
12 quarter of 2015?

13 A. It's a little below 1500, so roughly 1400 orders of
14 interest.

15 Q. What does the blue part of the bar reflect?

16 A. The blue part is an order that's shipped, that's fully
17 shipped, so that part of the order of interest were fully
18 shipped.

19 Q. What does the orange part of the bars reflect?

20 A. Those are partially shipped.

21 Q. Can you explain what you mean by partially shipped?

22 A. It would be a part of the order was shipped, but a part of
23 it would not have been shipped.

24 Q. Do you see that there are gray parts of some of these bars?

25 A. Some of the bars do have gray parts.

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1 Q. What do those gray parts reflect?

2 A. Those gray parts were denied shipment.

3 Q. Those are orders of interest that RDC did not ship?

4 A. That's correct.

5 Q. And so finally at the top of the bar there are percentages;
6 is that right?

7 A. That's correct, and those percentages are what share of the
8 total order of interest were either fully shipped or partly
9 shipped, so the blue and the orange.

10 Q. Let's take a look at some of the data here, and I want to
11 start in 2010 and 2011 as a reference point.

12 About how many orders of interest for controlled
13 substances was RDC receiving per quarter in those years?

14 A. It was receiving roughly 50 to 100 orders of interest per
15 quarter.

16 Q. How did that change between 2012 and the beginning of 2017?

17 A. You can see a very sharp rise, starting a little bit in the
18 end of 2013, particularly the middle of 2014 up through 2015
19 very, very high increase in orders of interest.

20 Q. Focusing on 2015, about how many orders of interest per
21 quarter was RDC receiving during that year?

22 A. Roughly 1500 orders of interest per quarter.

23 Q. According to this chart, what did the data show about what
24 RDC was doing with those orders?

25 A. In each case in over 90 percent of the cases, it was

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shipping them full or in part, almost entirely in full.

Q. Let's turn ahead now to the next slide, slide 13. What's the data portrayed on this slide?

A. This is the same chart, the same outline of the chart, but this is for oxycodone and fentanyl, the two particular drugs we were talking about yesterday.

Q. Just to make sure I have it clear, the prior chart showed orders of interest for all controlled substances, and this chart focuses only on oxycodone and fentanyl which are a subset of those controlled substances?

A. That's correct.

Q. Again, let's begin by focusing on 2010 and 2011, about how many orders of interest was RDC receiving on those drugs in those first two years?

A. Probably about 20 to 30 orders of interest per quarter for those drugs in 2010 and 2011.

Q. And how did the number of the orders of interest that RDC received for oxycodone and fentanyl change between 2012 and the beginning of 2017?

A. It shows the same pattern, which is a very large increase starting in 2013, particularly picking up through 2014, very high in 2015, and still high but somewhat lower in 2016.

Q. So looking at 2015, about how many orders of interest per quarter was RDC receiving on oxycodone and fentanyl?

A. Roughly 500 orders of interest per quarter.

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1 Q. Let's stay focus on that 2015 set of bars. During that
2 year when the orders of interest were at their highest, what
3 did the data show about what was happening to the orders of
4 interest?

5 A. Over 95 percent of the orders of interest were shipped in
6 whole or in part, the vast bulk shipped in whole.

7 Q. The data you've just been looking at focused on the number
8 of orders of interest that RDC received and released, have you
9 looked at RDC's order of interest data in any other way?

10 A. Yes, I've looked at the doses that were ordered and then I
11 look to see what happened with the doses of controlled
12 substances.

13 Q. Where did that data on doses come from?

14 A. It comes from the information from the company.

15 Q. Why did you look at doses separately from the numbers of
16 orders of interest?

17 A. The orders of interest, each order can have a lot of doses
18 or a little, so I wanted to look -- I wanted to take the unit
19 which is kind of dosing unit and see how that would -- what I
20 found for those dosing units.

21 Q. Let's turn to the next slide which is slide 14 in
22 Government Exhibit 903.

23 Can you explain what this slide shows?

24 A. If you just look. There are the three different types of
25 opioids; fentanyl, oxycodone and all opioids. And then what

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1 you see in the different columns are the number of flagged
2 doses, so those are doses that were flagged by the order of
3 interest system; how many of those doses were then shipped, and
4 therefore what percentage of the flagged doses were shipped.

5 Q. Let's take that one at a time.

6 Starting with fentanyl, how many doses were flagged?
7 How many doses were shipped, and what was the percentage?

8 A. 621,504 doses were flagged by the order of interest system.
9 516,844 were shipped, and that's 83 percent of the flagged
10 doses were shipped.

11 Q. How does that compare to the second line item for
12 oxycodone?

13 A. There were many more flagged doses. The same percentage
14 were shipped, so 85 percent, roughly the same percentage.

15 Q. And finally, how does that compare to opioids overall.

16 A. Very similar pattern. For all opioids there were over 6
17 million flags does, 83 percent of which were shipped.

18 Q. I'd like to turn back to Government Exhibit 276 now. Turn
19 back to section 8 which is on page 6.

20 Do you see under subsection 8 the third paragraph
21 begins with the words, orders of interest.

22 A. Yes, I do.

23 Q. Can you read the three paragraphs.

24 A. Orders of interest are potential suspicious orders that
25 meet or exceed the customer's establishing purchasing threshold

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1 or other criteria. RDC will investigate orders of interest to
2 determine whether they are suspicious orders. Suspicious
3 orders cannot be filled and must be reported to DEA.

4 Q. Now, again, have you analyzed whether RDC investigated
5 orders of interest?

6 A. I have not.

7 Q. Have you review data on the number of times that RDC
8 reported suspicious orders to the DEA?

9 A. Yes, I have.

10 Q. Could you describe at a high level what you did?

11 A. We have the orders of interest, and so I know how many were
12 shipped, how many were denied. There's also data on how many
13 of those orders were reported to the DEA.

14 Q. Why did you look at that information together?

15 A. It's very clear in the policies what's supposed to happen,
16 so I wanted to see how frequently that did occur.

17 Q. Let's go back to Government Exhibit 903 and turn to the
18 next slide which is slide 15. What does the data on this chart
19 show?

20 A. These are all the orders of interest, so the units here are
21 the orders of interest from 2010 to 2016. The first bar is how
22 many of them were shipped, so that's adding up over all the
23 previous charts that we were looking at. So 12,784 orders of
24 interest were shipped.

25 The second bar is how many were fully or partially

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1 denied, so that's a much smaller number, 1200. You know that's
2 smaller because we were looking at that on the prior page, and
3 then how many were reported as suspicious orders to the DEA.
4 Four were reported.

5 Q. Have you compared the number of orders of interest that
6 were either partially totally denied to the number of
7 suspicious orders that were filed?

8 A. Yes, the number of suspicious orders that are filed. Four
9 is obviously much, much smaller than the number that were
10 partially or totally denied.

11 Q. Have you done any other analyses of suspicious order
12 reports that RDC filed with the DEA?

13 A. Yes, I looked in the time series to see how those compare
14 while Mr. Doud was running the company and then after he
15 stopped running the company, what happened to the suspicious
16 order reports.

17 Q. Let's turn to the next slide which is slide 16. Without
18 getting into the specifics of the data just yet, what's
19 generally charted out on this slide?

20 A. These are all the suspicious order reports that RDC filed
21 to the DEA by month from 2012 up through the end of 2017.

22 Q. What does the blue bar reflect?

23 A. The blue bar reflects the period of time where Mr. Doud was
24 there and actively running the company, the number of
25 suspicious order reports.

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1 Q. And what do the red bars reflect?

2 A. The red bars reflect the fact the suspicious order reports
3 either after he had formally left or in the couple of months
4 just before. Where based on prior testimony that I reviewed,
5 it was reported that Mr. Doud was not particularly involved
6 with the company, so the first three months of 2017, so for all
7 of 2017 how many suspicious order reports are there.

8 Q. Just to be clear, when exactly did Mr. Doud officially
9 retire according to what you've seen in the information you
10 reviewed?

11 A. According to what I've seen, he officially retired at the
12 end of March 2017.

13 Q. Why don't you have red bars going back to the beginning of
14 January of 2017?

15 A. Several of the earlier witnesses that I read the testimony
16 of reported that starting in January of 2017 he was generally
17 not around. He was in Florida. He was having less to do with
18 the company, and so therefore those orders of interest would
19 more properly be characterized as post-Doud than during
20 Mr. Doud tenure.

21 Q. What does this chart and the data you analyzed show about
22 the number of orders of interest filed between 2012 and the end
23 of 2016 compared to the number of the orders of interest filed
24 in the year after?

25 A. You can see the four reports which are in early 2014.

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1 That's the -- remember we were looking at the very high number
2 of orders of interest of 2015 and 2016, there are no suspicious
3 order reports filed in those years at all. And then you can
4 see after Mr. Doud left the company, the number of suspicious
5 order reports increased quite markedly.

6 Q. Let's turn ahead now to the next slide, slide 17. I want
7 to talk about one last slide on this topic.

8 Now, have you reviewed data on the number of
9 pharmacies that RDC either terminated as a customer, suspended
10 due to a red flag or filed a suspicious order report on in the
11 years after Mr. Doud left the company?

12 A. Yes, I have.

13 Q. Specifically was that Government Exhibit 278, which is
14 listed here in the source categories?

15 A. That's correct.

16 Q. What did you do with that information in the first chart
17 that we have here on the left?

18 A. I took all the companies that had been reported, that had
19 been suspended or terminated after Mr. Doud left the company;
20 and then I said, for how many of those companies was there at
21 least one order of interest during the period 2010 to 2016 when
22 Mr. Doud was in charge of the company.

23 Q. What did you find?

24 A. Seventy-five percent of the customers who were suspended or
25 terminated after Mr. Doud left the company had an order of

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1 interest in those years while he was the CEO of the company.

2 Q. Why did you look at that data?

3 A. I wanted to see whether -- given that we know that
4 afterward the company decided they were not appropriate
5 purchasers, whether there had been any indication beforehand
6 that they were potentially inappropriate purchasers.

7 Q. Now let's take a look at the data on the right part of this
8 slide, and can you explain what that shows?

9 A. For those 75 percent for which there was an order of
10 interest, so these are pharmacies that ultimately were
11 suspended or terminated, and there was an order of interest,
12 what happened to those orders of interest during the period
13 where Mr. Doud was the CEO of the company.

14 So you can see there were 6, 000 roughly total orders
15 of interest for those companies that were later suspended or
16 terminated. Only 374 of those orders were denied in full, and
17 there was only one suspicious activity report to the DEA.

18 Q. Now, I want to set this aside and go back to Government
19 Exhibit 276. Up until now you've been testifying about orders
20 of interest generated by this threshold based system that RDC
21 had; is that correct?

22 A. That's correct.

23 Q. In your review of these RDC policies like the one in
24 Government Exhibit 276, are there other things that could
25 qualify as orders of interest that aren't based on those

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1 numerical thresholds?

2 A. Yes, there are.

3 Q. Let's look back at section 8. Just to orient ourselves,
4 this is the order of interest, slash, suspicious order section
5 that you looked at earlier?

6 A. That's correct.

7 Q. Let's go to the next page. Do you see that the next
8 subsection after thresholds is called controlled substance
9 percentages?

10 A. Yes.

11 Q. Could you read the first sentence of that, please?

12 A. As a general matter, RDC investigates controlled substances
13 orders and purchases by any customer that meets or exceeds 30
14 percent of all controlled and non-controlled substance
15 purchases per month.

16 Q. Let's take that down. Do you see at the bottom of the page
17 there's a subsection D titled red flags?

18 A. Yes.

19 Q. Could you read the first sentence there?

20 A. DEA has identified red flags that may indicate that a
21 pharmacy may be dispensing controlled substances for other than
22 legitimate medical purposes and whose orders are therefore
23 potentially of interest and suspicious.

24 Q. Do you see that after that it said red flags include, and
25 there's a list that extends on to the next page?

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Cutler - Direct

1 A. Yes.

2 Q. Now without having us go through and read each of those,
3 could you describe in general terms what are some of the red
4 flags that are listed out here?

5 A. They tend to be characteristics of the purchasers of the
6 controlled substances, so people who are paying cash. Cash
7 doesn't literally mean dollar bills, it means non-insurance.
8 So people who are paying not through insurance or people who
9 are buying extremely high quantities of pills or people who are
10 buying from out of state. Those are all red flags. Those are
11 things that tend to be associated with abuse and diversion of
12 drugs from legal to illicit purposes, and so the DEA identified
13 those as red flags that pharmacies and distributors should be
14 looking out for.

15 Q. Now, are all of the criteria that RDC used to identify red
16 flags listed out here specifically in this document?

17 A. Not all. Some of them are numeric and some of them are not
18 numeric.

19 Q. Are there other sources or testimony that you've relied on
20 to identify more specific criteria for the red flags that are
21 listed out here?

22 A. Yes. I've relied on these documents. I've also relied on
23 the testimony of Ruth Carter DEA agent in terms of what they
24 thought, and I also reviewed the testimony of Jessica Pompeo
25 who indicated some of the red flags, and also some of -- I'm

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Cutler - Direct

going to mispronounce his last name, David --

Q. Mr. Pietruszewski?

A. Mr. Pietruszewski, who also commented on some of them.

Q. And let's take a look at another document. Could you please put up Government Exhibit 21C. Is this an example of another one of the documents you relied on?

A. Yes, it is.

Q. What is this?

A. This is the due diligence, the pharmacy due diligence document.

Q. And if you look down, let's zoom in on the last bullet here. Could you read that sentence there?

A. A schedule 2 prescription written for pain should not exceed 120 dosage units unless the prescriber provides the necessary information that the patient is being treated for cancer, intractable pain or is terminally ill.

Q. Just to give an example, what did you use this type of document and the testimony you've identified to do?

A. What I did was, I looked at individual orders from pharmacies and I would see how many of them exceeded the dose, but I actually applied a more stringent criteria, a more conservative criteria.

I said, if it was not 120, which is what it said here, but if it was a 180 dosage units, then I'm going to say that that exceeded what the target was and that was a red flag.

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Cutler - Direct

1 Q. Let's take this down. Just zooming out, at a high level,
2 have you done anything to analyze whether RDC sold to
3 pharmacies that had dispensing data that exhibited some of the
4 red flags that were listed in RDC's documents and in the
5 testimony you reviewed?

6 A. Yes, I have.

7 Q. What did you do?

8 A. I had data from the New York state prescription drug
9 monitoring program where they collect all the information that
10 pharmacies submit daily to New York state in terms of
11 dispensing of controlled substances, and then I had all that
12 information so I could look and see what share of the
13 prescriptions at each pharmacy hit one of those -- one or more
14 of those red flags.

15 Q. Now, before we get to those examples, I want to ask you
16 about how you chose the pharmacies that you examined.

17 Were you able to analyze every pharmacy that RDC sold
18 to?

19 A. No, I was not.

20 Q. Why not?

21 A. There are a lot of different pharmacies and they weren't
22 all able to be pulled.

23 Q. So how did you decide what pharmacies to analyze?

24 A. I analyzed every pharmacy for which data was made
25 available.

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Cutler - Direct

1 Q. Is that data made available by the prescription drug
2 monitoring program system that you mentioned earlier?

3 A. That's correct.

4 Q. About how many pharmacies was that?

5 A. Forty-one pharmacies.

6 Q. Where are those pharmacies located?

7 A. They're all in New York.

8 Q. Now, you mentioned that chose pharmacies because you had
9 data from this prescription drug monitoring program, what is
10 that?

11 A. That's a data source that most states now have because
12 their intensely interested in preventing the abuse of
13 controlled substances, so they require all prescriptions, all
14 filled prescriptions to be sent into the state, and then they
15 collect information which doctors can query to find out how
16 frequently patients are getting medications, which government
17 officials can look at to see which medications are being
18 provided and whether there are red flags associated with them
19 and any number of things like that.

20 Q. Now, did RDC have access to that exact database that you
21 used?

22 A. It did not.

23 Q. So why did you use that database?

24 A. RDC had access to the pharmacies and it could ask the
25 pharmacies, and remember the pharmacies are submitting this

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Cutler - Direct

1 data to the state. So RDC could have gotten the data with one
2 or who exceptions. Like it couldn't get the name of the
3 patient, but other than that, it could get all that data from
4 the pharmacy.

5 Q. Just to be clear, how, if at all, was the data you reviewed
6 related to the data that was available to RDC?

7 A. I did not use any information on the name, so I did not
8 need to know any of that, the name of the customer, so all of
9 the data that I reviewed would have been available to RDC.

10 Q. At a high level, could you explain what you did for each
11 pharmacy that you analyzed?

12 A. I looked at how many orders it placed with RDC first to see
13 what the controlled substance share was, and then I looked at
14 the total orders from the pharmacy as reported in the data to
15 see was this a pharmacy that was hitting the red flag criteria.

16 Q. Now, I want to be clear, did you analyze what, if anything,
17 RDC did to investigate these pharmacies or investigate the red
18 flags you identified in the data?

19 A. I did not.

20 Q. Why didn't you do that?

21 A. I'm not in the best position to that. I'm an outsider.
22 I'm looking at the data. It's much better to get information
23 from the company on what it did in response to these.

24 Q. I'm going to show you -- and let's please just show for the
25 witness, the Court and the parties, Government Exhibit 904, and

M1QBDOU2 Cutler - Direct

Government Exhibit 906.

Do you recognize these documents?

A. Yes, I do.

Q. What are they?

A. Government Exhibit 904 is a summary for all the 41 pharmacies. Government Exhibit 906 has information on each of the 41 pharmacies with information about their orders and the red flags for that pharmacy.

Q. And are these the charts that you were referring to just a moment ago?

A. That's correct.

Q. Do these charts summarize voluminous sets of data and records?

A. They summarize a lot of data.

MR. BURNETT: At this time, the government offers exhibits 904 and 906 in evidence.

THE COURT: Any objection?

MR. JANEY: No objection.

THE COURT: They will be admitted into evidence.

(Government's Exhibits 904 and 906 received in evidence)

Q. Let's publish 906 and let's go ahead to page 55 of that. I just want to walk through one example to clarify what it is you did. What pharmacy is this page about?

A. This is about ProHealth pharmacy. You see that at the very

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Cutler - Direct

1 top row.

2 Q. And what is the data that's portrayed on this first page
3 about ProHealth pharmacy?

4 A. The first page here is showing you for each month the
5 number of dosage units that were submitted by -- requested by
6 ProHealth pharmacy to RDC.

7 Q. What does the blue part of each bar reflect?

8 A. The blue is, as we were looking at in the prior charts,
9 blue is the shipped and never flagged.

10 Q. What are the red and orange bars reflect?

11 A. The red were the flagged orders that were shipped, and the
12 orange or the yellow is the flagged orders that were flagged
13 and stopped.

14 Q. When you say flagged, is this flagged by that threshold
15 based order of interest system you talked about?

16 A. That's correct. This is from the threshold base order of
17 interest system.

18 Q. According to this slide, about how many dosage units of
19 opioids was RDC selling to ProHealth in say 2015?

20 A. It was about 40 to 50,000 dosage units per month.

21 Q. Let's look at the next slide 56. Is this also about
22 ProHealth pharmacy.

23 A. That's correct. This is a summary for ProHealth pharmacy.

24 Q. I just want to walk through this slowly one, because is
25 this a model for what your other charts look like?

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Cutler - Direct

1 A. All of the pharmacies have an exactly similar chart.

2 Q. Let's start with the first two rows. What's the data
3 that's portrayed there about ProHealth in the first two rows?

4 A. The first two rows are from RDC. They're the total sales
5 from RDC to ProHealth up through the first quarter of 2017, and
6 then the second row is the controlled substances sales over the
7 same time period.

8 Q. How much revenue according to these charts did RDC make
9 from ProHealth by selling controlled substances?

10 A. Roughly \$5.5 million, so that's the 5.4 million in the
11 second row.

12 Q. Do you see the third row is called controlled substances
13 share of sales (30 percent)?

14 A. Yes, I do.

15 Q. What's that?

16 A. This is what share of the sales -- so what I'm going to
17 calculate is what share of the sales to ProHealth pharmacy were
18 controlled substances. And remember early it said that in the
19 document, RDC was going to treat as something to investigate if
20 it's above 30 percent, so that's why the 30 percent is in
21 parenthesis there.

22 Q. What percentage of ProHealth's purchases from RDC were from
23 controlled substances?

24 A. 61.8 percent.

25 Q. Why is that in red?

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Cutler - Direct

1 A. It's in red because it exceeds the 30 percent.

2 Q. Now, the next row that's titled percent of opioid dosage
3 units flagged as above limits that were shipped, was that
4 referring to?

5 A. If you remember going back to the previous chart, there was
6 the blue which was shipped, and then the red which was -- the
7 orange which was not shipped, so this is what share of the
8 flagged dosages were shipped.

9 Q. And according to the chart, what percentage of ProHealth's
10 orders of interest flagged by the system were shipped?

11 A. 93.3 percent.

12 Q. Why is that in red?

13 A. It's in red because that's a very high number.

14 Q. Do you see that the next row is cash share schedule 2
15 prescriptions?

16 A. Yes, I do.

17 Q. What does that mean?

18 A. So I was talking about one of the red flags was the
19 customer paying in cash, that is, either literally in cash or
20 just not through insurance. It's the cash share of the
21 schedule 2 prescriptions. The 10 percent comes from the
22 testimony of Jessica Pompeo and also from Ruth Carter, both of
23 whom suggested that that was a natural number to think of.

24 Q. So according to this chart, what percentages of ProHealth
25 schedule 2 controlled substance sales were for cash?

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Cutler - Direct

1 A. 12.6 percent.

2 Q. And is that in red because it's over that 10 percent
3 threshold?

4 A. It's in red because it's over the 10 percent threshold.

5 Q. The next row is similar, it's another cash share row.
6 What's that?

7 A. This looks specifically at oxycodone which is one of the
8 most abused drugs.

9 Q. Why did you break out a particular drug to look at the cash
10 percentage of that?

11 A. Not all opioids are the same. Some are more likely to be
12 abused than others. Oxycodone was one of the most abused ones,
13 so I wanted to look specifically at one of the most abused
14 opioids.

15 Q. What percentage of ProHealth's oxycodone sales were for
16 cash?

17 A. 13.9 percent.

18 Q. Is that also red because it's over that 10 percent
19 threshold?

20 A. That's correct.

21 Q. Now, the next entry in the row says, out of state shares
22 schedule 2 prescriptions. What does that mean?

23 A. That's what share of the prescriptions that were filled by
24 ProHealth were to people who were outside of New York state,
25 whose address was outside of New York state.

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Cutler - Direct

1 Q. Why did you select that as one of the criteria you were
2 using?

3 A. It's both referred to in Government Exhibit 276, which is
4 the red flags and the specific numbers were also suggested by
5 Jessica Pompeo's testimony.

6 Q. That's the 5 percent threshold?

7 A. That's correct. So that testimony said, look, if there's
8 one or two customers from out of state, you're not going to
9 make that big a deal; but if it's a significant number, that's
10 a red flag, and a significant number would be 5 percent.

11 Q. And according to this chart, what percentage of ProHealth's
12 controlled substance sales went to out of state patients?

13 A. Fifteen percent.

14 Q. Is that red because it's over the 5 percent?

15 A. That's correct.

16 Q. The next is the share of oxycodone prescriptions with 180
17 plus pills. I think you touched on this briefly earlier, but
18 what does that mean?

19 A. So remember the red flag analysis was getting a lot of
20 doses. And in specific, in Government Exhibit 21C, a lot was
21 defined as 120 doses. So for 30 days, that's six pills per
22 day. I actually took the more conservative number which is 180
23 pills.

24 Q. Why is there 20 percent in parenthesis there?

25 A. The 20 percent -- so obviously if there's one or two

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Cutler - Direct

1 prescriptions, you don't want to say that that pharmacy is
2 automatically doing something suspicious. There's no -- the 20
3 percent is not labeled in any document, but I thought 20
4 percent was a sufficiently high number, that if it was above
5 that -- it seems like that something that ought to be
6 investigated.

7 Q. What percentage of ProHealth's oxycodone sales were for
8 over 180 pills?

9 A. 44.9 percent.

10 Q. And again it's red because it's over 20 percent?

11 A. That's correct.

12 Q. Finally, the last entry is flagged doctor share of schedule
13 2 prescription, what did you mean by flagged doctor?

14 A. RDC kept a list of doctors who it thought might be
15 prescribing for other than just medical purposes who might be
16 doing suspicious prescribing, and so I took that list of
17 doctors and said, what share of the prescriptions from each
18 pharmacy were written by those doctors.

19 Q. Why do you have 5 percent in parenthesis here?

20 A. Again, if it's just one or two you may say that okay, so I
21 wanted to impose more than just a minimal number, and 5 percent
22 seemed like a number that was a significant amount of it.

23 Q. So according to this chart, what percent of ProHealth's
24 schedule 2 prescriptions were written by doctors that RDC had
25 flagged in its system?

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Cutler - Direct

1 A. 28.3 percent.

2 Q. And again, why is that red?

3 A. That's red because it's above the 5 percent.

4 Q. Did you do this same set of analyses for all of the 41
5 pharmacies you looked at?

6 A. Yes, I did.

7 Q. We're not going to go through all of them. But instead, I
8 want to go back to Government Exhibit 904 which is already in
9 evidence.

10 What's this chart here?

11 A. This is those same rows, and what I'm giving you here is
12 the count out of the 41 pharmacies, how many of them surpass
13 those criteria, each of the criteria.

14 Q. For the information on the left, that's the same red flag
15 criteria you just walked through in detail?

16 A. That's correct, those are exactly the same.

17 Q. And how about the information on the right, what's that?

18 A. That's the number of the 41, so it's up to 41, the number
19 of the 41 that met that red flag criteria.

20 Q. So just to move through this efficiently, how many of the
21 41 pharmacies had a red flag because the controlled substance
22 share was over 30 percent?

23 A. Ten.

24 Q. How many had a red flag because they exceeded their
25 purchase limit?

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Cutler - Direct

1 A. Thirty-seven.

2 Q. How many had a red flag because they sold over 10 percent
3 of schedule 2 sales for cash?

4 A. Thirteen.

5 Q. How about how many had a red flag because they sold over 10
6 percent of oxycodone for cash?

7 A. Fourteen.

8 Q. How many had a red flag because the share of out of state
9 prescribers for schedule 2 substances was over 5 percent?

10 A. Nine.

11 Q. How about how many had a red flag because the share of
12 oxycodone prescriptions for over 180 pills was more than 20
13 percent?

14 A. Eleven.

15 Q. And finally, how many had a red flag because they sold more
16 than 5 percent of schedule 2 controlled substance prescriptions
17 for doctors that RDC had flagged?

18 A. Twenty-three.

19 Q. Let's go back to Government Exhibit 906 now. I actually
20 just want to flip through a few examples. Let's start on page
21 25. What pharmacy is this?

22 A. This is Bay Ridge pharmacy in Brooklyn.

23 Q. Did you do the same two slides for Bay Ridge that you did
24 for ProHealth?

25 A. Yes, I did.

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Cutler - Direct

1 Q. What do you see about the sales data for Bay Ridge
2 pharmacy?

3 A. Bay Ridge pharmacy had a very, very rapid increase in
4 sales, part of which was flagged, but most of it was shipped
5 without being flagged. And then of the flagged orders, a lot
6 of them were shipped.

7 Q. Let's go to the next slide now, 26.

8 I want to focus in on the bottom two of the red flags
9 criteria that you used, could you explain what you saw in the
10 data for those?

11 A. So the bottom two here are the share of oxycodone with a
12 lot of pills, remember this is 180 pills. And the red flag
13 that I put in was 20 percent, and here it's 24 percent. And
14 similarly what share of the schedules 2 prescriptions were by
15 doctors who were flagged by RDC, that's over 30 percent, that
16 31.5 percent relative to the 5 percent red flag.

17 Q. Let's go ahead now to page 35.

18 What pharmacy is this for?

19 A. Seventh Elm Drug Corporation in New York.

20 Q. What's this first slide show?

21 A. Again, it shows you the total orders, and you could see
22 it's increasing particularly rapidly through 2011 and remains
23 high for many years.

24 Q. So say between 2013 and 2014, about how many dosage units
25 per month was RDC sending to Seventh Elm?

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Cutler - Direct

1 A. Maybe 70 to 80,000 per month.

2 Q. Let's go to the next slide. Is this also for Seventh Elm?

3 A. That's correct.

4 Q. And here let's look at the bottom three criteria that you
5 analyzed for red flags.

6 Could you describe what you saw in the data?

7 A. The bottom two are the same as what we were just looking
8 at, and again you see high shares of lots of oxycodone pills,
9 22.8 percent; high share of prescriptions to doctors who were
10 flagged by RDC, 34.9 percent.

11 And in addition, this pharmacy had a very high share
12 of out of state prescriptions, prescriptions to people out of
13 state, 19.1 percent of the schedule 2 prescriptions compared to
14 the limit of 5 percent, the red flag target at 5 percent.

15 Q. Let's go ahead to page 53. You see this is called Double G
16 pharmaceuticals in Astoria, New York?

17 A. Yes.

18 Q. What do you see about the sales data here?

19 A. Again, a very rapid increase, particularly in 2014 and
20 2015.

21 Q. Let's go to the next slide. Could you talk about what you
22 saw in the data, this time focusing on the cash share metrics
23 and the flagged doctors?

24 A. This one picks up a different metric which is what share of
25 the customers are paying cash that is not through insurance,

M1QBDOU2

Cutler - Direct

1 both for schedule 2 prescriptions overall and for oxycodone
2 prescription in particular, each of them are 10.9 percent and
3 10.3 percent, above the 10 percent flag. And also in that last
4 row, 18.9 percent of the prescriptions were written by doctors
5 who were on the flagged list from RDC.

6 Q. Let's turn ahead to page 59. You see this is for Linden
7 Care pharmacy?

8 A. That's correct.

9 Q. What do you see about the sales in Linden Care in this
10 chart?

11 A. Linden Care sales increased a lot. First off the numbers
12 are much higher. Linden Care bought a substantial number of
13 opioids or of schedule 2 drugs, lots of red flags, most of
14 which were flagged and shipped.

15 Q. Now, you mentioned that Linden Care purchased a large
16 number of opioids. Just for reference around 2015, about how
17 many dosage units per month was Linden Care buying from RDC?

18 A. Around the start of 2015, it was roughly 400 to 500,000
19 dosage units per month.

20 Q. Let's look at the next slide.

21 Could you describe the red flag criteria that you saw
22 with respect to Linden Care?

23 A. Some of this is consistent with the specifics of Linden
24 Care, so it had a very high controlled substances share and it
25 had a very high out of the state share because it's a mail

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Cutler - Direct

1 order pain management pharmacy, so not every red flag is
2 obviously something that would invalidate it; but also the more
3 troubling ones here are the last two ones which are the share
4 of oxycodone prescriptions with a lot of pills, 180 plus pills,
5 that's 25.6 percent; and the flagged doctor shares, that's 21.4
6 percent of all the schedule 2 prescriptions.

7 Q. Let's go ahead now to page 81. You see this is for Windsor
8 pharmacy?

9 A. Yes.

10 Q. And this chart is a little bit different than some of the
11 other charts you looked at?

12 A. It's a shorter time period.

13 Q. And what do you see about the data on sales to Windsor
14 pharmacy?

15 A. Windsor pharmacy is about 100,00 dosage units per month,
16 and particularly toward the end of 2016 it has a lot of red
17 flags, but those red flags are predominantly shipped.

18 Q. Let's look ahead to the next slide. What did you see in
19 the data here? Let's focus on the flagged doctor share.

20 A. In the last row there you can see the flagged doctor share
21 is 22.3 percent of the prescriptions at Windsor pharmacy for
22 schedule 2 prescriptions at Windsor 2 pharmacy were by doctors
23 who were flagged by RDC.

24 Q. Now looking up you see the controlled substance share line?

25 A. Yes.

M1QBDOU2

Cutler - Direct

1 Q. What do you see about the information for Windsor there?

2 A. So 75.7 percent of all the sales from RDC to Windsor
3 pharmacy are controlled substances. That's well above the 30
4 percent that's in the RDC documents as the threshold.

5 Q. I just want to look at one last one of these examples on
6 page 61. What pharmacy is this?

7 A. Old Town pharmacy in Staten Island.

8 Q. Now, about how many dosage units was Old Town pharmacy in
9 Staten Island buying from RDC between say 2015 and early 2016?

10 A. About 15 to 20,000 dosage units per month.

11 Q. Are you familiar with the system called ARCOS that's
12 maintained by the DEA?

13 A. Yes, I am.

14 Q. How are you familiar with it?

15 A. I've used it in my research. I've used it in doing various
16 type of analyses, a very common database.

17 Q. Are you reviewed the ARCOS data about RDC's shipments of
18 oxycodone to Old Town pharmacy?

19 A. Yes, I have.

20 Q. What did you find about RDC's shipments to Old Town
21 pharmacy around 2016 compared to the shipments from other
22 distributors?

23 A. RDC was the predominant supplier of oxycodone to Old Town
24 pharmacy over this time.

25 Q. And was there a period of time where it was the only

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Cutler - Direct

1 provider of oxycodone?

2 A. Yes, in 2016 -- so over part of this period of time, it was
3 one of several, and then in 2016 it was the only supplier of
4 oxycodone to Old Town pharmacy.

5 Q. Now, let's go to the next slide. Could you describe what
6 you saw about the red flag in the data for Old Town pharmacy?

7 A. So you can see that -- let me focus on the last five rows
8 or the middle of those. There was a very high share of cash
9 prescriptions. So the share of schedule 2 prescriptions and of
10 oxycodone in particular, was 38 and roughly 43 percent, well
11 above the 10 percent limit. A lot of the prescriptions was for
12 many, many pills, so almost a third of them were for 180 or
13 more pills. And half of the prescriptions, over half of the
14 prescriptions were written by doctors who were on the flagged
15 list of RDC.

16 Q. Now, I just have a few more questions I want to ask you.
17 Before we get to those, could we have for the witness and the
18 parties and the Court Government Exhibit 908A.

19 If you don't mind flipping through those quickly.

20 Have you reviewed these?

21 A. Yes, I have.

22 Q. What are they?

23 A. These are the exact same charts that I've been showing you
24 for a number of different pharmacies.

25 Q. And do they summarize the contents of voluminous records?

M1QBDOU2

Cutler - Direct

1 A. Yes, they do.

2 MR. BURNETT: At this time the government offers 908

3 A.

4 THE COURT: Any objection?

5 MR. JANEY: No objection.

6 THE COURT: They will be admitted into evidence.

7 (Government's Exhibit 908 A received in evidence)

8 MR. BURNETT: We don't need to cover that. We can
9 take that down. Instead, I would like to go back to 903 and
10 turn to the very last slide which is 18.

11 Q. Do you recall that earlier in your testimony you talked
12 about reviewing data on the number of pharmacies that RDC
13 terminated after Mr. Doud left the company?

14 A. Yes, I do.

15 Q. And that's referred to as Government Exhibit 278, right?

16 A. Yes.

17 Q. Actually for the moment let's pull up and publish for the
18 jury Government Exhibit 278.

19 You see that document on your screen?

20 A. Yes, I do.

21 Q. How did you use this to identify terminated pharmacies?

22 A. You see in the action column here, column E, you can see
23 exactly what RDC's actions were, so there's red flag,
24 suspension, there's termination and so forth. I used that.

25 Q. Let's take that down and go back to the last slide on

M1QBDOU2

Cutler - Cross

1 Government Exhibit 903.

2 using that chart you just looked at, were you able to
3 identify all the pharmacies that RDC terminated after
4 Mr. Doud's departure from the company?

5 A. Yes, using that spreadsheet.

6 Q. After identifying those terminated pharmacies, what did you
7 do to create data on this chart?

8 A. After identifying those pharmacies, I then went back into
9 earlier years and I said, what share of RDC's opioid sales were
10 in those prior years were from pharmacies that were later
11 terminated by RDC.

12 Q. Let's walk through that. In 2014, what does the data show?

13 A. 71.7 percent of RDC's opioid sales in 2014 were to
14 pharmacies that were terminated after Mr. Doud left the
15 company.

16 Q. How about in 2015?

17 A. 73.4 percent.

18 Q. And how about in 2016?

19 A. 63.4 percent.

20 MR. BURNETT: No further questions, your Honor.

21 THE COURT: Cross examination, Mr. Janey.

22 MR. JANEY: Yes, your Honor. Thank you.

23 CROSS-EXAMINATION

24 BY MR. JANEY:

25 Q. I was going to say good morning. I think it's now noon, so

M1QBD0U2

Cutler - Cross

1 I'll say good morning or good afternoon depending on your
2 preference, Mr. Cutler.

3 A. Good afternoon to you too.

4 Q. Mr. Cutler, during your testimony particularly yesterday
5 you remarked that some of your research in healthcare policy
6 has given you insight into the potential harmful effects of
7 opioids, correct?

8 A. That's correct.

9 (Continued on next page)

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Mlq3dou3

Cutler - Cross

1 Q. You recall that testimony?

2 A. Yes, I do.

3 Q. Nevertheless, based on your research -- answering yes or
4 no -- you would agree that oxycodone and fentanyl are
5 prescribed in this country for severe chronic pain, correct?

6 A. Yes.

7 Q. Cancer-related pain, correct?

8 A. Yes, that is a primary indication.

9 Q. Severe arthritis pain, correct?

10 A. I'm going to say correct. I also just want to note that
11 there is a lot of debate whether they are appropriate for some
12 of these.

13 Q. That wasn't my question.

14 A. Okay.

15 Q. That wasn't my question.

16 Breakthrough pain, correct?

17 A. Yes.

18 Q. And you know about the pain management application of
19 oxycodone and fentanyl through your health care policy
20 research, correct?

21 A. That's correct.

22 Q. That being said, you are not a medical doctor, correct?

23 A. No, I am not.

24 Q. You have never prescribed either oxycodone or fentanyl to a
25 patient, correct?

M1q3dou3

Cutler - Cross

1 A. I have never prescribed.

2 Q. You don't have a license from any authority in the United
3 States as a medical professional to monitor patients prescribed
4 either oxycodone or fentanyl, correct?

5 A. That's correct.

6 Q. In general terms, your knowledge about oxycodone and
7 fentanyl is based on your research, what you've read, correct?

8 A. What I've read and the research that I've conducted.

9 Q. And you testified yesterday that you have views about
10 health care and are willing to talk about it with anyone. Is
11 that correct?

12 A. That's correct.

13 Q. Now, turning to some of your testimony yesterday, with
14 respect to what I'll describe as the market. And with respect
15 to the analysis you performed for this case, and in particular,
16 regarding RDC, you testified that RDC opioid shipments
17 increased while industry sales fell. Do you recall that
18 testimony?

19 A. Yes, I do.

20 Q. Now, when we say "industry," I'd like to better understand
21 how many other market suppliers, suppliers, distributors, to
22 use them interchangeably, did you count to constitute the
23 industry that you referred to in that testimony?

24 A. So there are three big distributors, and then there are a
25 number of other smaller ones. What I took was all the data

Mlq3dou3

Cutler - Cross

1 from the ARCOS database, which includes all the three big ones
2 and all the small ones in those three states. So it was the
3 universe outside of RDC.

4 Q. And to be clear, you counted market participants, to use
5 that word, competitors, other wholesale suppliers, as an
6 industry for three specific states, correct?

7 A. That's correct.

8 Q. And those three specific states that you used to create the
9 industry are sales in New York, correct?

10 A. Correct.

11 Q. New Jersey?

12 A. Correct.

13 Q. And Pennsylvania?

14 A. That's correct.

15 Q. And you did that because that's where 95 percent of the RDC
16 opioid sales were made, correct?

17 A. That's right.

18 Q. So, when you say that opioid sales for the industry as
19 opposed to sales for RDC fell from 2010 to 2015 for the
20 industry, you're only taking into account the market
21 participants' sales in New York, New Jersey, and Pennsylvania,
22 correct?

23 A. I thought that was the fairest comparison.

24 Q. Yes or no?

25 A. Yes, and because I thought that was the fairest comparison.

Mlq3dou3

Cutler - Cross

1 Q. Answering yes or no, in your testimony on this issue,
2 you're not comparing RDC's sales to those of other suppliers
3 across the country, correct?

4 A. In the testimony yesterday, I did not; that is correct.

5 Q. Now, based on your research and analyzing data related to
6 controlled substances, you are familiar with the Drug
7 Enforcement Administration, the DEA, I'll shorten it, that the
8 DEA publishes aggregate production quota data, correct?

9 A. Yes, I am familiar with that.

10 Q. In fact, this data is made public in the Code of Federal
11 Register, the CFR, correct?

12 A. Yes.

13 Q. Production quota data describes the amount of controlled
14 substances manufacturers are permitted to make, correct?

15 A. That's correct.

16 Q. And the aggregate production quota data describes the
17 amount the DEA has authorized, and some might use the term
18 across the board, correct?

19 A. That's correct.

20 Q. Now, directing your attention to the 2010 to 2015 time
21 frame. The amount of fentanyl authorized for production by the
22 DEA actually increased substantially, correct?

23 A. That's correct.

24 Q. In the year 2015 alone, the DEA authorized increases in the
25 production of fentanyl that actually increased above the 2014

M1q3dou3

Cutler - Cross

1 level that it had authorized, correct?

2 A. I don't have the numbers at the top of my head. I wouldn't
3 be surprised if that's true. But I don't have those specific
4 numbers memorized.

5 Q. Directing your attention to the 2010 to 2015 time frame.
6 The amount of oxycodone authorized for production by the DEA
7 actually increased exponentially from 2011 to 2013, correct?

8 A. Again, I don't have the numbers off the top of my head, so
9 I don't want to agree or disagree.

10 Q. But is it fair to say, based on your experience and your
11 research, that you understand that that actually took place?

12 A. Yes, over most time periods the DEA was increasing the
13 production quotas.

14 MR. JANEY: Showing the witness for identification
15 what is premarked as Defense Exhibit T1. Showing it to the
16 parties and just to the witness.

17 Q. This is an aggregate production quota history issued by the
18 DEA for the period 2009 to 2019. Do you see that there?

19 A. Yes, I do.

20 Q. Based on your testimony, you're familiar with this data,
21 correct?

22 A. Yes.

23 Q. Have you used this data in your research?

24 A. Yes, I have.

25 MR. JANEY: Your Honor, at this time we request that

M1q3dou3

Cutler - Cross

1 what's premarked as Defense Exhibit T1 be admitted in evidence.

2 THE COURT: Any objection?

3 MR. BURNETT: Objection, relevance.

4 THE COURT: Overruled. It can be admitted.

5 (Defendant's Exhibit T1 received in evidence)

6 Q. Drawing your attention to the lower part of the chart, and
7 I'll ask that it be highlighted or popped out, describing
8 oxycodone production quotas. That we can highlight -- I'm
9 sorry, your Honor, everyone has it. Thank you.

10 Let the record reflect that the exhibit has been
11 published to the jury.

12 There are two lines, Mr. Cutler, they're describing
13 oxycodone. Do you see that?

14 A. Yes, I do.

15 Q. The first line describes production quotas for something
16 called oxycodone conversion. Correct?

17 A. Yes.

18 Q. Now, that line is meant to denote production quota for
19 oxycodone that has been converted from prior opioids, including
20 oral oxycodone, to OxyContin, correct?

21 A. That's my understanding of that line, yes.

22 Q. The line below labeled as oxycodone sales describes
23 production quotas for non-conversion forms of oxycodone.
24 Correct?

25 A. That's correct.

Mlq3dou3

Cutler - Cross

1 Q. Let's focus there. In that line, specifically, drawing
2 your attention to the time frame 2010 to 2013 in particular.
3 Please describe to the jury what we're looking at.

4 A. So those are the DEA production quotas for the oxycodone
5 for sale.

6 Q. The production quota reduces slightly between 2010 to --
7 I'm sorry. Between 2012 to -- it increases from 2012 to 2013.
8 Do you see that there?

9 A. Yes, I do.

10 Q. How is it measured? How do we think about the measurement
11 of the increase?

12 A. So, these are in kilograms of particular substance, so we
13 need to convert that into MMEs, and I don't know off the top of
14 my head how to convert that into MMEs.

15 Q. If we think of it in the form of kilograms, how would you
16 characterize just in orders of magnitude the increase in the
17 production quota?

18 A. In that year, it's roughly a 50 out of 100 million. So
19 roughly a 50 percent.

20 Q. Thank you. Now, if we can look above the top of the chart
21 in the area that's describing fentanyl. And I believe that the
22 fentanyl is in the third line. And drawing your attention from
23 the 2010 to the 2015 time frame, just across that time frame,
24 isn't it fair to say that the production quota for fentanyl
25 increased substantially in that time frame?

M1q3dou3

Cutler - Cross

1 A. I tell my students that "substantial" is not a scientific
2 term. So I don't want to use that. But it absolutely
3 increased. Any individual, I tell them, is allowed to decide
4 if it is substantial or not.

5 Q. Based on your experience as an economist and viewing it as
6 an economist who has testified with experience in data
7 analysis, isn't it fair to say that you would characterize the
8 growth in the production quota between '09 and 2015 as
9 significantly increasing over the time frame?

10 A. I would describe it that way. That's a value statement,
11 not a scientific statement.

12 Q. I'm asking for your view of the databased and your
13 experience and background that you've testified about.

14 A. Okay.

15 Q. We can take that down.

16 In your discussions yesterday, you described the
17 overview of the pharmaceutical distribution chain. Do you
18 recall that exhibit?

19 A. Yes, I do.

20 Q. You testified about the relationship between the
21 distributor and the retail pharmacy. Do you recall that
22 discussion?

23 A. Yes, I do.

24 Q. Is it fair to say that the distributor sells to the retail
25 pharmacy?

M1q3dou3

Cutler - Cross

1 A. Yes.

2 Q. And in layman's terms, sales of oxycodone and fentanyl are
3 driven by the demand that the distributor receives from the
4 retail pharmacy, correct?

5 A. Yes.

6 Q. So, again, focusing within the 2010 to 2015 time frame.
7 Let's consider the actual prescriptions written for opioids.
8 The Centers for Disease Control and Prevention, the CDC,
9 publishes U.S. opioid dispensing rate maps, correct?

10 A. Yes, they do.

11 Q. And are you familiar with this data?

12 A. Yes, I am.

13 Q. What is this data?

14 A. They have information on all the prescriptions of opioids
15 and then they collect it and they make certain summary
16 statistics about it.

17 Q. And this data is publicly available, correct?

18 A. That's correct.

19 Q. And when the CDC publishes U.S. opioid dispensing data,
20 it's very disaggregated, correct? In other words, to state it
21 differently. You can look at opioid dispensing data by state,
22 correct?

23 A. That's correct.

24 Q. You can look at it by county, correct?

25 A. The -- I can't remember if the CDC data are by county, but

M1q3dou3

Cutler - Cross

1 certainly the ARCOS data is by county.

2 Q. Again, focusing on the 2010 to 2015 time frame, and taking
3 into account actual prescriptions for opioids, for 2012, are
4 you familiar that the CDC reported that the total number of
5 prescriptions dispensed was more than 255 million, a rate of
6 81.3 prescriptions per 100 persons?

7 Are you familiar with that?

8 A. So, I don't keep that exact number in my head. But sounds
9 like the order of magnitude that it was.

10 Q. Now, going back to your discussion about RDC opioid
11 shipments increasing during the 2010 to 2015 time frame, to put
12 things into context. DEA production quotas increased during
13 this time frame, correct?

14 A. Yes.

15 Q. Prescriptions for opioids increased during this time frame,
16 correct?

17 A. I -- I -- I would want to look at the data on that, because
18 I know that the overall shipments in the country fell. So I
19 don't know whether prescriptions were falling or rising. So I
20 just don't want to agree to that.

21 MR. JANEY: Marking for identification what's
22 premarked as Defense Exhibit T2. Showing it to the parties and
23 to the witness.

24 Q. This is a U.S. state opioid dispensing rate chart published
25 by the CDC for 2010. Are you familiar with this data?

M1q3dou3

Cutler - Cross

1 A. Oh, yes.

2 MR. JANEY: We request that Defense Exhibit T2 be
3 admitted in evidence.

4 THE COURT: Any objection?

5 MR. BURNETT: No objection.

6 THE COURT: It will be admitted in evidence.

7 (Defendant's Exhibit T2 received in evidence)

8 Q. Mr. Cutler, if we can consider some of the states or at
9 least one of the states that you used in your analysis in
10 describing to this jury the industry for RDC, the industry
11 scope, New Jersey, New York, Pennsylvania. Let's look at
12 Pennsylvania.

13 So can you describe for us the data, there is only one
14 data statistic there, but can you describe what that means?
15 We're in the year of 2010.

16 A. So, it's -- I just want to look at the units. So it is the
17 dispensing rate per 100 people, and it is 81. And I don't
18 remember if that's the number of prescriptions or what exactly
19 that is, so I would want to look at the units for it.

20 Q. Certainly. Does that help you, Mr. Cutler?

21 A. It doesn't say it here exactly what the rate is. So it's
22 probably in the detailed data description somewhere.

23 Q. Well, if I direct your attention to the far-right-hand
24 column next to state abbreviation. It defines it as opioid
25 dispensing rate per 100, correct?

M1q3dou3

Cutler - Cross

1 A. I just don't know what it is exactly.

2 Q. But let's look at the number. Right. So on its face, what
3 the chart is describing, what the CDC is describing there with
4 the example of Pennsylvania and we'll go back down, is that the
5 rate is 81 opioid dispensing volumes per 100, correct?

6 A. That's correct.

7 Q. Let's consider the same information for the year 2011.

8 MR. JANEY: Marking for identification what's
9 premarked as Defense Exhibit T3. Showing it only to the
10 parties and to the witness.

11 MR. BURNETT: Did you mind just scrolling down?

12 MR. JANEY: We request that this document be received
13 in evidence.

14 MR. BURNETT: No objection.

15 THE COURT: It will be admitted in evidence.

16 (Defendant's Exhibit T3 received in evidence)

17 Q. And there scrolling down to Pennsylvania, this is the year
18 2011. Correct, Mr. Cutler?

19 A. Yes.

20 Q. The number has increased slightly to 81.7, correct?

21 A. Yes, that's correct.

22 Q. And now, looking at the year, considering the year 2012.

23 MR. JANEY: Marking for identification what is
24 premarked as Defense Exhibit T4.

25 Q. And again, you recognize this data, correct, Mr. Cutler?

M1q3dou3

Cutler - Cross

1 A. Oh, yes.

2 Q. Right.

3 MR. JANEY: We request that the exhibit be received in
4 evidence.

5 MR. BURNETT: No objection.

6 THE COURT: It will be admitted in evidence.

7 (Defendant's Exhibit T4 received in evidence)

8 Q. Now looking at Pennsylvania for 2012, it's increased even
9 more, correct?

10 A. That's correct.

11 Q. And considering the year 2013, marking for identification
12 what's premarked as Defense Exhibit T5. This is a U.S. state
13 opioid dispensing rate chart published by the CDC for 2013,
14 correct, Mr. Cutler?

15 A. That's correct.

16 Q. Drawing your attention to the area discussing Pennsylvania.
17 It declines slightly to 81.6, correct?

18 A. That's correct.

19 Q. And again, the dispensing rate is measured in prescriptions
20 per 100 persons, correct?

21 A. That's my guess as to what that rate is.

22 Q. Right. So, viewed in that way, as dispensing rates of
23 prescriptions per 100 persons, using the year of 2012 as an
24 example, is it fair to say that the dispensing rate in
25 Pennsylvania was 83, approximately 83 prescriptions per 100

M1q3dou3

Cutler - Cross

1 persons?

2 A. That's correct.

3 Q. So now --

4 MR. JANEY: I'm sorry, your Honor. One moment.

5 THE COURT: Yes.

6 MR. JANEY: Your Honor, I just want to clarify the
7 record to be sure that I requested that Exhibit T5 be admitted
8 in evidence.

9 THE COURT: Yes. There was no objection?

10 MR. BURNETT: That's right.

11 THE COURT: All right. It's admitted in evidence.

12 (Defendant's Exhibit T5 received in evidence)

13 Q. Thank you, Mr. Cutler, for your patience.

14 Now, viewing this data for one of the markets you
15 testified about where RDC sold opioids, again, we're using
16 Pennsylvania as an example. Is it fair to say that the market
17 demand for prescriptions in Pennsylvania was strong as compared
18 to some other states, based on your knowledge and experience;
19 yes or no?

20 A. I don't know the market for Pennsylvania relative to the
21 U.S. average.

22 Q. If we consider it from the perspective using this
23 measurement and these exhibits that we've been discussing,
24 measured as prescriptions per 100 persons, is it fair to say
25 that the market demand for prescriptions in Pennsylvania was

M1q3dou3

Cutler - Cross

1 strong as compared to other states?

2 MR. BURNETT: Objection. That's a totally arbitrary
3 cutoff.

4 THE COURT: Sustained as to the form of the question.

5 Q. Based on your knowledge and experience --

6 THE COURT: Was it what?

7 Q. Based on your knowledge and experience, was the dispensing
8 rate as measured in prescriptions per 100 persons in
9 Pennsylvania in the time frame of 2010 to 2013 strong as
10 compared to other states? Again, based on your knowledge and
11 experience.

12 A. So, when you say -- so I'm not going to answer yes or no.
13 When you say that, I would want to look at the same averages
14 for the U.S. as a whole, and I would compare the Pennsylvania
15 prescription rate to the U.S. prescription rate, and I haven't
16 found those here. If you show me the U.S. rate, I can make a
17 judgment.

18 Q. Certainly you would agree, based on the exhibits we've been
19 discussing, that the dispensing rate for Pennsylvania during
20 the time frame that we've been discussing, 2010 to 2015, is
21 hardly declining; isn't that fair to say?

22 MR. BURNETT: Objection. He hasn't shown him data up
23 to 2015.

24 THE COURT: Overruled. If he is aware of that data,
25 he can answer the question.

M1q3dou3

Cutler - Cross

1 A. Between 2010 and 2013, the prescription rate went up by
2 less than 1 percent.

3 Q. But my question was about the decline. Right. It's not
4 declining, is it?

5 A. No, it increased very slightly.

6 Q. Based on the data you've received for this case,
7 Mr. Cutler, you have no way of knowing whether dispensing made
8 by RDC to pharmacies in Pennsylvania were for prescriptions
9 that were legitimate or illegitimate, correct?

10 A. That's correct.

11 Q. You can only make the observation that RDC distributed to
12 pharmacies during this time frame for X amount of
13 prescriptions, correct?

14 A. That's correct.

15 Q. You are not an expert in diversion, correct?

16 A. I don't think that's correct. I've done a lot of work on
17 diversion.

18 Q. Well, my question is different. Do you consider yourself
19 to be an expert on diversion?

20 A. On the economic aspects of diversion, yes.

21 Q. Are you an expert on compliance?

22 A. I think --

23 Q. Is that why you are here today, to talk about your
24 expertise in compliance?

25 A. I -- I think I need you to be a little more detailed about

M1q3dou3

Cutler - Cross

1 what you mean by the question of expert on diversion. I have
2 done research that looks at, for example, what the relationship
3 is between over time opioid shipments and the share of people
4 who report obtaining opioids from other than legal sources,
5 which is a form of diversion.

6 Q. Well --

7 A. So I've done that research. So, as an economic matter, I
8 have done work on it.

9 Q. Does that research in your view make you an expert on
10 diversion?

11 A. On some aspects of diversion.

12 Q. You testified earlier when the government, when counsel
13 asked you whether you were here today, yesterday, today, to
14 provide your opinion about investigations at RDC, and whether
15 the conduct that you reviewed might have been something for you
16 to testify about. Do you recall those questions?

17 A. Yes.

18 Q. And your answer was that you are an outsider, correct?

19 A. With respect to anything happening within the company, I am
20 absolutely an outsider.

21 Q. And your testimony, both yesterday and today, was that
22 you're not in a good position to talk about RDC's responses to
23 issues like red flags, correct?

24 A. That's correct. I am not testifying about anything RDC did
25 or did not specifically do.

M1q3dou3

Cutler - Cross

1 Q. Right. And you certainly are not in a position to testify
2 about what this defendant Larry Doud did or did not do,
3 correct?

4 A. That's correct. I have not testified at all nor am I able
5 to on what the defendant did or did not do.

6 Q. By 2017, based on your knowledge and research, you know
7 that, in general terms, there were less prescriptions for
8 oxycodone and fentanyl, correct?

9 A. That's correct.

10 Q. And you also know, based on your knowledge and research,
11 that the DEA cut production quotas in 2017, correct?

12 A. That's correct.

13 Q. The pharmacy dispensing data shows that there were less
14 prescriptions in 2017, correct?

15 A. As in some earlier years. It wasn't just 2017.

16 Q. But my question is with respect to 2017.

17 A. Hmm-hmm.

18 Q. I'm sorry, can you say yes or no?

19 A. Oh, I apologize, to you, sir.

20 MR. BURNETT: Objection. 2017 compared to what?

21 MR. JANEY: No.

22 THE COURT: Overruled. I don't think that's the
23 question.

24 What's your question?

25 MR. JANEY: I think the witness understood it and

M1q3dou3

Cutler - Cross

1 answered it.

2 A. If you could just repeat the question.

3 Q. Again, drawing your attention to the year 2017, the
4 pharmacy dispensing data shows that there were less
5 prescriptions, correct?

6 A. Than in 2016?

7 Q. Yes.

8 A. Yes.

9 Q. Is it fair to say that naturally wholesalers would be
10 distributing less of these drugs in 2017, because there was
11 less demand, correct?

12 A. That's correct.

13 Q. Drawing your attention to slide 11 and what's been admitted
14 in evidence as Government Exhibit I believe it's 903. The 18
15 page.

16 Putting this information from slide 11 into
17 perspective, just based on the sales data --

18 MR. JANEY: I'm sorry. Just one moment, your Honor.

19 THE COURT: Yes.

20 Q. I'm going to do it the old fashioned way, Mr. Cutler. We
21 can take the exhibit down.

22 You testified about the sales data at RDC during the
23 time frame through 2017, do you recall that, of opioids?

24 A. Yes, I do.

25 Q. So, putting some of this into perspective then, just with

M1q3dou3

Cutler - Cross

1 respect to the sales data, part of the reason there was less
2 concentration of opioid sales at RDC as reflected by customers
3 in 2017, is because there was less supply of opioid approved by
4 the DEA, and fewer prescriptions being written by doctors,
5 correct?

6 A. I would guess the second of those would have been more
7 important than the first. Because RDC was not a big part of
8 the national total. But, probably any change through 2017
9 would definitely reflect changes in physician prescribing,
10 among other things.

11 Q. So, if we can look at slide seven. So viewing the
12 government's exhibit slide seven and these shipments compared
13 to other industries, and in particular drawing your attention
14 to the middle bar graph with the 222 percent.

15 First just to orient all of us, what year is that?

16 A. So these are the changes from 2010 to 2015.

17 Q. Yes. The 222 percent is meant to say what?

18 A. There was a large increase in fentanyl shipments by RDC.

19 Q. And is that meant to indicate over the entire time frame of
20 2010 to 2015?

21 A. That's cumulative change from beginning to end.

22 Q. So between 2010 to 2015?

23 A. That's correct.

24 Q. In compiling data for this chart, you reviewed RDC sales
25 data, correct?

M1q3dou3

Cutler - Cross

1 A. That's correct.

2 Q. And based on your review of the sales data, what component
3 of this growth is represented by the RDC customer Linden Care?

4 A. I don't have the exact number in front of me.

5 Q. It's fair to say that Linden Care was the largest consumer
6 of this drug from RDC? Is that fair to say?

7 A. Based on everything I know, that is correct.

8 Q. Right. But you are not able to identify for us what
9 component Linden Care comprised of that statistic?

10 A. I don't remember the exact number. I do remember that even
11 when I made this chart without Linden Care, it was still a
12 sizable increase in the fentanyl shipments.

13 Q. Right. So, let's consider another very large customer of
14 RDC, Dunn Meadow. Are you familiar with that name?

15 A. Yes, I am.

16 Q. What component of that growth is reflective of Dunn
17 Meadow's consumption of opioid shipments from RDC?

18 A. So I don't have that exact number in front of me. I
19 remember also having done this figure excluding both Linden
20 Care and Dunn Meadow, and there was also -- and even then there
21 was an increase in the fentanyl shipments.

22 Q. And as you sit here today, though, acknowledging that both
23 Dunn Meadow and Linden Care were some of the largest consumers
24 of opioids from RDC, even assuming that these numbers are
25 correct, you're not able to testify whether the Linden Care

M1q3dou3

Cutler - Cross

1 opioid shipments or the Dunn Meadow opioid shipments were
2 legitimate or illegitimate, correct?

3 A. With respect to all the shipments, I'm making no -- I'm
4 pointing out the facts, not specific to those two pharmacies.

5 Q. Either way. Okay.

6 In your testimony, part of what you described in the
7 area of Larry Doud's compensation is that there were two
8 elements, if I'm understanding correctly, that contributed to
9 his bonus compensation. Do you recall that testimony?

10 A. Yes, I do.

11 Q. And you characterized it in terms of the contribution of
12 controlled substances to Mr. Doud's bonus as a direct and an
13 indirect effect. Do you recall that?

14 A. Yes, I do.

15 Q. And part of your testimony is that with respect to the
16 direct impact that the controlled substances had a specific and
17 direct impact on profit, assuming certain things about the
18 sales. Do you recall that?

19 A. Yes, I do.

20 Q. And you described the indirect effect, in sum and
21 substance, as Mr. Doud received a benefit from the controlled
22 sales by the sales of the non-controlled, because they were in
23 effect bundled together. In other words, your testimony was
24 that a customer would want both controlled and non-controlled.
25 Do you recall that testimony?

M1q3dou3

Cutler - Cross

1 A. Yes, I do.

2 Q. In coming to that view, did you survey any of the RDC
3 customers to test whether bundling is more than just a mere
4 theory in this particular instance?

5 A. No, I did not survey any of the customers.

6 Q. Did you review any customer contracts where you were able
7 to identify that this type of bundling was a requirement in the
8 contract?

9 A. No, I didn't.

10 Q. We can see Government Exhibit 278, please. I'm sorry, can
11 we -- let's take that down for a minute.

12 We're bringing it up.

13 A. Okay.

14 Q. Do you have it there, Mr. Cutler?

15 A. Yes, I do.

16 Q. Great. Now, I understood your testimony today with respect
17 to this particular slide to say that you looked at 2017 data,
18 correct?

19 A. These data are for the years 2012 through 2016.

20 Q. That's not my question. My question is I understood your
21 testimony earlier to be that you first looked at 2017
22 termination data, correct?

23 A. The termination data were all times after Mr. Doud's
24 departure.

25 Q. Let's do it this way. Pull up Government Exhibit 278,

M1q3dou3

Cutler - Cross

1 please. In conjunction with the slide 18 that I just showed
2 you, the government first asked you on direct, I'm not sure
3 first or second, but certainly in relation, the government
4 asked you whether you looked at this slide as a part of your
5 analysis. Do you recall that testimony?

6 A. Yes.

7 Q. And you testified that this chart is about 2017 termination
8 data, correct?

9 A. Also 2018.

10 Q. And 2018?

11 A. And 2018.

12 Q. Thank you. So this is the chart that you looked at and
13 analyzed in developing slide 18; is that correct?

14 A. That's correct. Earlier you had said 2017, so I was just
15 trying to correct it and say also 2018.

16 Q. Okay. Thank you. Now if we can look at slide 18.

17 A. I apologize for not being clearer.

18 Q. I apologize for being confusing. But we are on same page.

19 If we can see slide 18, please. Looks like everyone
20 has it.

21 Now to come back to the exhibit, in developing this
22 slide, you looked at termination data for 2017 and 2018,
23 correct?

24 A. That is correct.

25 Q. And to be clear about what this slide is showing, you did

M1q3dou3

Cutler - Cross

1 not actually look at termination data for 2012, 2013, '14, '15
2 and '16, correct?

3 A. Not for this slide; that is correct.

4 Q. You looked at 2017 and 2018 data, and you made an inference
5 about what the allocation would be for terminations in this
6 time frame. Correct?

7 A. No, that's not correct.

8 Q. Please clarify then.

9 A. Okay, I didn't make an inference. What I did was I
10 calculated what share of all the opioid shipments were to
11 pharmacies that were later terminated.

12 Q. But you didn't do that on a bottoms up basis, correct? In
13 other words, you didn't look at termination data from 2012, did
14 you?

15 A. No, I didn't. It wasn't relevant for the point I was
16 trying to make here.

17 Q. I am asking the question, you didn't look at data for 2013
18 in developing this chart, did you?

19 MR. BURNETT: Objection. What data?

20 THE COURT: Overruled. You can answer.

21 A. I'm stumbling because I'm not quite sure what you're trying
22 to ask. But, no, I did not look at 2013 termination data.

23 Q. You didn't look at 2014 termination data, did you either?

24 A. No. Again, this is based on, I wanted to see based on
25 subsequent terminations what were the shipments like. So those

M1q3dou3

Cutler - Cross

1 terminations wouldn't have been relevant.

2 Q. You don't know what the actual terminations were in, for
3 example, 2015, do you?

4 A. No.

5 Q. You don't know what the actual terminations were in 2016?

6 A. They're in the data but --

7 Q. Yes or no?

8 A. Oh. They are not here. They are in the data that I have,
9 but I haven't analyzed them.

10 Q. You have not analyzed them. Right? You did not analyze
11 for the purposes of this slide actual termination data for
12 2013, did you?

13 A. No, not for this slide.

14 Q. We can take it down. Let's look at exhibit 905, please.

15 THE COURT: Mr. Janey, unless you're almost done, I'd
16 like to take the lunch break.

17 MR. JANEY: I was in my own world.

18 THE COURT: You're in this world.

19 MR. JANEY: I'm not almost done. So I'm happy to
20 break for lunch.

21 THE COURT: Ladies and gentlemen, we are going to take
22 lunch. Don't discuss the case, keep an open mind. I am going
23 to try to bring you out at 2 o'clock.

24 (Jury excused)

25 THE COURT: You can step down, sir.

M1q3dou3

Cutler - Cross

1 Mr. Janey, where are you about?

2 MR. JANEY: Not too much longer, your Honor.

3 THE COURT: Let's come back at 1:55 so we can talk
4 about where we are and how we are going to proceed.

5 (Recess)

6 (Continued on next page)

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M1QBDOU4

AFTERNOON SESSION

2:00 p.m.

(In open court; jury not present)

THE COURT: Mr. Gottlieb, can we wind up witnesses tomorrow and sum up Monday.

MR. JANEY: Your Honor, if I may. I did as your Honor instructed. I spoke with the second witness where we had the question. The issue is, your Honor, he is an expert in two different cases. I asked him to elaborate to me. And based on what he could, only because of confidentiality reasons. He is an expert for a reinsurer where Merck has filed a \$1.5 billion claim and that is in litigation.

He is the expert in that case. That litigation is at a critical juncture. He anticipated based on the work he was doing for us and the work in the Merck case that he would have this week and testify next week based on the schedule that we had previously advised him on. He has moved things around and is able to be here on Friday morning, but he is not able, because of the commitment in the Merck, in the reinsurance litigation where's an expert to be here tomorrow.

THE COURT: But he's not testifying tomorrow in that case?

MR. JANEY: That's correct, your Honor. He's not testifying. But based -- he could not elaborate to me because of confidentiality reasons all of what is involved there. He

M1QBDOU4

1 has not testified and cannot be here tomorrow, but can be here
2 Friday.

3 THE COURT: I still don't hear good reason why he
4 can't be here tomorrow.

5 MR. JANEY: I'm trying my level best to relay and
6 convey the explanation. There's apparently something going on
7 in that litigation that impedes him from being here tomorrow.

8 THE COURT: But what's the difference between tomorrow
9 and Friday?

10 MR. JANEY: Whatever that commitment is with Merck, he
11 believes that it can be resolved by tomorrow.

12 THE COURT: Where is he?

13 MR. JANEY: Physically right now?

14 THE COURT: What state is he in? Where he's coming
15 from?

16 MR. JANEY: I think he's coming from New Jersey, your
17 Honor.

18 THE COURT: That's not a good enough excuse. If
19 you're telling me he was flying from California --

20 MR. JANEY: No, he's not flying from California.

21 THE COURT: If you want us to accommodate him any
22 particular time tomorrow, I'm willing to do that, but, no,
23 that's not a good excuse that he needs to consult and sit with
24 them at their trial tomorrow and I'm not even sure that's what
25 you're saying. You're not saying he's testifying tomorrow and

M1QBDOU4

1 so he can't be here tomorrow because he's in Jersey.

2 MR. JANEY: He's not testifying tomorrow, your Honor.

3 THE COURT: That's not good enough.

4 MR. JANEY: I don't have that representation.

5 THE COURT: As I said, we can accommodate him. If you
6 want to accommodate him in the morning or accommodate him in
7 the afternoon, I'm willing to work with you on that. But, no,
8 that's not a good reason that he can't be here because he's
9 getting paid by somebody else to consult with them and he
10 doesn't want to come over from Jersey.

11 MR. JANEY: I understand, your Honor. Just to
12 clarify, because I don't want to leave your Honor with the
13 impression that the expert simply doesn't want to come over
14 from Jersey. I understand --

15 THE COURT: That's the impression that I have. I
16 don't have any reason to believe he can't be here tomorrow.

17 MR. JANEY: I understand, your Honor. I don't want to
18 give you that impression. That's not the impression that I
19 have. The impression that I have is the nature of that
20 litigation requires him -- he anticipated in scheduling his
21 work that he would be testifying on Monday. He asked
22 alternatively could he testify on Friday morning and that's
23 what I'm coming back with.

24 THE COURT: Tell him I'll accommodate him any time
25 tomorrow, but he must rearrange his schedule and tell the other

M1QBDOU4

1 lawyers who are paying him in another litigation that he cannot
2 be there. He hasn't said to me that he's in front of a judge
3 testifying. He hasn't said to me that there's anything
4 preventing him from making a choice as to which case is more
5 important to be at. My position is, it's more important for
6 him to be at the case where he has to testify, and he's the
7 last witness in that case than to simply sit and consult with
8 another set of lawyers on another case.

9 If we were in the opposite position and the judge in
10 Jersey was telling me that he wanted him over in Jersey and I
11 was saying to that judge, well, he's consulting with his client
12 over here so he can't come and testify, I think that wouldn't
13 be an appropriate thing for me to do to prevent what is
14 important testimony, particularly important testimony in a
15 criminal case.

16 MR. JANEY: I understand, your Honor.

17 THE COURT: Tell him I want him here tomorrow and that
18 what I've been told is not a good enough excuse for us to have
19 to, one, make this jury come in here on Friday; and two, delay
20 this trial another several days after only having and you say
21 you have a character witness tomorrow, which is usually in my
22 experience -- I'd be surprise if it takes more than 20 minutes
23 to deal with that witness, given the limited nature of
24 character testimony.

25 MR. JANEY: I understand, your Honor.

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1 THE COURT: Tell him to get here. Tell him we'll
2 accommodate him any time he wants to be here. Tell me before
3 the end of the day if there's something we need to adjust for
4 him tomorrow, but I'd like to finish with the testimony
5 tomorrow, give the jury Friday off, don't drag them here on
6 Friday just for this witness and for us to be prepared and give
7 you the whole weekend to prepare yourself for summations and
8 have summations on Monday. Okay.

9 MR. JANEY: Understood, your Honor.

10 THE COURT: Thank you.

11 MR. GOTTLIEB: Your Honor, before we begin, over lunch
12 I just had conversations with Mr. Roos. We heard that the last
13 witness is a paralegal, so I inquired as to the offer of proof
14 of calling a paralegal now.

15 THE COURT: Are there charts that go with this
16 paralegal? Are there exhibits? Does defense have those
17 exhibits?

18 MR. ROOS: Yes.

19 MR. GOTTLIEB: Your Honor, I point out we already had
20 a summary witness. We already had our time spent, the jury's
21 time spent listening to email after email read. It struck me
22 that there was only going to be one summary witness, and it
23 seems unnecessary for her just to get on the stand and in
24 effect give two summary witnesses and maybe you can even call
25 it a third summation for the government.

M1QBDOU4

1 THE COURT: I don't disagree with you in the abstract.
2 Is this something substantive that this witness is going to add
3 to this case that we don't already have in this case?

4 MR. BURNETT: Your Honor, the witness is going to be
5 talking about two things: So first, there are a few charts of
6 sales data to particular pharmacies that have not been entered
7 in evidence through the expert, and what the summary witness
8 has done is mapped exhibits that are evidence onto those
9 charts. I think our concerns there are few pharmacies in
10 particular where there's been some testimony about, some emails
11 offered from both sides, to elicit a timeline of how things
12 work and to line that up with actual sales to real pharmacies.

13 THE COURT: What will be the relevant testimony that
14 goes along with this exhibit?

15 MR. BURNETT: What she's going to do is present the
16 charts to the jury, say what those charts are, how she mapped
17 the exhibits onto the charts, and she'll be reading by no means
18 all emails that are on the chart, just reading several emails
19 that are on each of the charts.

20 THE COURT: This is a chart similar to what chart?

21 MR. BURNETT: Basically Government Exhibit 908 is the
22 one that Professor Cutler entered into evidence earlier this
23 morning.

24 THE COURT: This is similar to his charts as opposed
25 to similar to the email charts?

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1 MR. BURNETT: What it is, is, it's his charts and then
2 there are basically lines drawn into the charts where they line
3 up with dates that mark off where certain exhibits line up in
4 the timeline.

5 MR. GOTTLIEB: Your Honor, I'd like to point out --

6 THE COURT: Can I see a copy of it.

7 MR. GOTTLIEB: I didn't see these until I did reach
8 out to Mr. Roos and he was good enough apparently to send me an
9 email. I haven't even seen these charts.

10 THE COURT: You're one step ahead of me. You have
11 them and I don't. What do you want me to do?

12 MR. BURNETT: We can bring up a copy. There was a
13 version that was produced I believe two or three days ago and
14 then an updated version that was produced yesterday.

15 MR. GOTTLIEB: We haven't had time to analyze them,
16 your Honor. Quite frankly, now hearing that they're putting in
17 documents that we haven't even seen, the fact of the matter is
18 as a summary witness without having had giving us the chance to
19 analyze it, we object to it. We're all in a rush and a hurry
20 to finish this up. It seems to be a colossal waste of time and
21 it's improper.

22 MR. BURNETT: Couple of things. First, the exhibits
23 that are marked on the chart are in evidence. They're not new
24 exhibits. The charts themselves were produced a couple of days
25 ago to defense, and an updated version was produced yesterday.

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1 This is going to be the bulk of the testimony.

2 THE COURT: What are in the boxes?

3 MR. BURNETT: Those boxes refer to government and
4 defense exhibits that are already in evidence.

5 THE COURT: Are those emails?

6 MR. BURNETT: Yes.

7 THE COURT: Are they all emails?

8 MR. BURNETT: Almost all emails. I think there are a
9 couple like compliance report or like a spreadsheet.

10 THE COURT: What is the testimony that's supposed to
11 go along with this?

12 MR. BURNETT: The paralegal will be explaining just
13 what it is these charts show, like how she put them together.
14 And second, she'll be going through some of the emails that are
15 marked off on the chart.

16 THE COURT: How many of those emails?

17 MR. BURNETT: I think it depends on the pharmacy. For
18 some it's like two or three, others five or six.

19 THE COURT: How many total?

20 MR. BURNETT: She's not reading full emails. The
21 total, she'll read pieces of probably like in the 30 range.
22 She's reading a sentence or two from them for the most part.

23 THE COURT: How is that testimony not cumulative?

24 MR. BURNETT: Your Honor, I think for starters, some
25 of the emails -- many of the emails are in evidence but have

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1 not been read to the jury yet at this point. There are others
2 that are in evidence that have been read which she wouldn't be
3 reading again to the jury. We'll note that the jury's seen
4 them and move on from them.

5 THE COURT: What are the second set of charts? I
6 don't understand what the difference is. What is 908A?

7 MR. BURNETT: 908A is just the raw charts that
8 Professor Cutler entered that the paralegal mapped the exhibits
9 onto.

10 THE COURT: This second envelope that you gave me
11 which has 908A in it is the exact same exhibits we already have
12 in evidence?

13 MR. BURNETT: 908A is in evidence.

14 THE COURT: These are not new exhibits that you intend
15 to offer?

16 MR. BURNETT: They're offered.

17 THE COURT: They're already in evidence through this
18 witness?

19 MR. BURNETT: Yes.

20 THE COURT: Let's put those aside for a second. The
21 new testimony and new exhibits that you want to offer is that
22 this paralegal has placed on certain spots on these emails
23 certain -- I mean certain spots on 908 indications of what
24 month and year certain emails were generated?

25 MR. BURNETT: Yes, and those emails are in evidence.

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1 Some of them the jury has actually seen already. Others they
2 haven't.

3 THE COURT: I understand the purpose of creating the
4 document and I don't hear that that's inconsistent with what
5 the testimony is and what the documents themselves
6 demonstrates. What is the purpose of having this witness go
7 through the same emails that we went through before?

8 MR. BURNETT: Many of these are not emails that the
9 jury has heard before. They're in evidence from much earlier
10 in the case.

11 THE COURT: But why is this the relevant witness to
12 question with regard to the content of these emails if you
13 didn't think they were relevant to ask the witnesses about who
14 had direct on these emails? What relevant testimony is this
15 witness -- the appropriate witness for these emails?

16 MR. BURNETT: Your Honor, I think what's important is
17 that the witness has basically put these in the order in which
18 the events occurred.

19 THE COURT: I understand that testimony. That's five
20 minutes worth of testimony. What else once she does that? I
21 don't understand why she's in a position to now read through a
22 series of new emails that you during the course of this trial
23 didn't think was important enough for any witness who had any
24 relevant knowledge about these emails to testify about.

25 MR. BURNETT: She's not uniquely qualified above

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1 anyone else to read the emails. I believe we're entitled to
2 present the jury with the evidence that's in evidence already
3 and she can convey that to the jury as a summary witness.

4 MR. GOTTLIEB: Your Honor, frankly, they're not
5 entitled to do it two, three times. There's nothing that
6 entitles them to do that. And looking at this chart right now,
7 we're going to have a witness say, well, this email falls to
8 this and this is an accurate email. Well, I'm going to need
9 time to now review.

10 THE COURT: This witness is not stating anything about
11 the accuracy of the email.

12 MR. GOTTLIEB: What I'm saying is, she has this chart
13 with boxes saying this email belongs here.

14 THE COURT: No, she has a chart that says I reviewed
15 this chart and I reviewed the e-mail and this is the timing of
16 this email in relationship to events that happened on this
17 chart. Do you object to that part of it?

18 MR. GOTTLIEB: Yes, because any witness on the stand,
19 if she says on this particular exhibit, Seventh Elm Drug Corp,
20 it looks like it's number 6 on the bottom, she's has all of
21 these boxes, which she clearly puts in here, I'm entitled now
22 to pull them out to review it to make sure that she's even
23 accurate about it.

24 THE COURT: No, you're not. You're entitled to, if
25 you want, to spend your evening doing that to look and see if

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1 that email that she put in April 2012, in fact was written in
2 2012.

3 MR. GOTTLIEB: So I need time, therefore --

4 THE COURT: How much time do you need to do that?

5 MR. GOTTLIEB: I need sufficient time to analyze this
6 particular --

7 THE COURT: No, you don't, because these exhibits are
8 already in evidence. They could do whatever they want to
9 without giving you further opportunity to analyze them. They
10 were in evidence. You had them. You didn't object to the
11 admission into evidence. They're in evidence.

12 MR. GOTTLIEB: Your Honor, how does anybody know she's
13 going to get up there and say this particular email now
14 properly belongs there.

15 THE COURT: Because it will take you 10 minutes to
16 check each one of these emails to see whether or not that's the
17 date on the email.

18 MR. GOTTLIEB: So before cross examination. All I'm
19 saying your Honor --

20 THE COURT: But you had the opportunity to do that.
21 This is not a good excuse about why she can't testify.

22 MR. GOTTLIEB: We didn't have an opportunity to do
23 that.

24 THE COURT: You didn't have an opportunity to verify
25 whether or not the exhibits that are in evidence that represent

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1 an email of a certain date? You didn't have the opportunity,
2 if you wanted to challenge, whether that in fact was the
3 correct date on that email?

4 MR. GOTTLIEB: Your Honor, so let me be clear. We had
5 the emails. This is the first time I'm seeing this chart with
6 those emails superimposed.

7 THE COURT: What is it you need to know? You're
8 making an argument that sounds like a rationale argument, but
9 it's not a reasonable argument. Government Exhibit 101A and
10 Government Exhibit 101B. It says it was April of 2012. How
11 much time do you need to verify if you haven't already verified
12 it that whether or not that was issued in April of 2012?

13 MR. GOTTLIEB: Your Honor, you have been involved in a
14 lot of trials. I have been involved in a lot of trials. The
15 government usually has one summary witness.

16 THE COURT: I understand that. I'm trying to
17 understand -- I know you don't want them to do this. I'm
18 trying to understand what you are trying to claim your
19 prejudice is, and you don't make a strong argument to say
20 somehow this is a big surprise that they're going to claim that
21 these emails were written on a certain date, in a certain month
22 and a certain year. That's not a legitimate argument to say
23 you're somehow prejudiced by that. You had these exhibits.
24 You agreed that these exhibits could come into evidence. These
25 exhibits are in evidence.

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1 MR. GOTTLIEB: You know how the defendant is
2 prejudiced, if I can explain that. A defendant sits here. The
3 government gets a bite of the apple, then they call a summary
4 witness, now they're calling a second summary witness, then
5 they're going to have a summation. So the government, in fact,
6 has three summations versus a defendant having one summation.

7 THE COURT: The government can call this witness. The
8 government can have this witness testify about what this
9 witness did. This witness took exhibits that were in evidence
10 and put them in the relevant month in which they're dated. And
11 then, to the extent that there is a relevant portion that
12 becomes relevant since this trial began, a relevant portion
13 that you want this witness to read, I'll allow you to let this
14 witness read some relevant portions.

15 But if it appears to me that you're simply having this
16 witness read portions that you could have done with the
17 relevant witnesses and now just to go over the same kind of
18 material, I mean, I just don't understand for what good reason
19 if these emails are relevant that you did not ask the relevant
20 witnesses who were on these emails about these emails or to
21 read these emails.

22 So Mr. Gottlieb is right, you're not entitled to three
23 summations and you're not entitled to five different witnesses
24 reading the same email. If you want selectively to select some
25 of these emails that have not already been read to indicate to

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1 the jury why you think this email is important in relation with
2 this timing, I'll allow you to do that. We're not going to
3 spend a lot of time going through dozens of emails that are
4 already in evidence and that you decided not to ask any
5 relevant witness who has any knowledge of the email about those
6 when we went through them painstakingly with the jury all of
7 these emails with all of these relevant witnesses who were on
8 the emails.

9 So get her up there, have her say what she did. You
10 want to pick a few, I'll give you some leeway. But if you
11 should indicate to us before the witness testifies how many of
12 these emails you're going to have this witness read, and then
13 I'll see if that's a reasonable number and see how strenuously
14 Mr. Gottlieb has an objection and then we'll move forward.

15 I assume that your representation is accurate that
16 none of these emails, these government exhibits, are reflected
17 on this chart, all of those are already in evidence?

18 MR. BURNETT: Yes, your Honor. That's accurate and
19 understood. There's one other thing that she'll be testifying
20 about which I think should take all of five minutes.

21 If you recall, Kerry Whitmore when she testified
22 offered in evidence a spreadsheet that showed the fentanyl
23 weight of sales by RDC distributed to RDC customers. The chart
24 that she offered showed the weight to every pharmacy that RDC
25 ever sold to between 2012 and 2016. The paralegal has taken

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1 that chart and identified a subset of pharmacies specifically,
2 she's gone through and identified pharmacies that were
3 terminated after Mr. Doud left and then the eight pharmacies
4 that are listed.

5 THE COURT: Where is that exhibit?

6 MR. BURNETT: That's Exhibit 909. I have a copy here.

7 MR. GOTTLIEB: Your Honor, based on what we've heard,
8 it only underscores, they already had testimony about it. Now
9 they want to bring on another witness to talk about the same
10 thing but highlight what would normally be done in a summation.
11 If they want to have a demonstrative piece of evidence for
12 summation, God bless the government, but they're not entitled
13 to now have a witness now take something that somebody has
14 already testified about and now to clean up a problem that
15 developed with that witness to now clarify through a paralegal.

16 THE COURT: Well, what is this chart?

17 MR. BURNETT: One of the charts is the fentanyl weight
18 of RDC's sales to the list of customers that were terminated
19 after Mr. Doud's departure from the company.

20 THE COURT: And which one is that? None of these have
21 an exhibit number on them.

22 MR. BURNETT: It should be the second page of 909.
23 It's the one that has more pharmacies.

24 THE COURT: What's the first page?

25 MR. BURNETT: The first page is the fentanyl weight of

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1 sales to the eight pharmacies that are listed in Exhibit 908.

2 THE COURT: And the second one, what is what?

3 MR. BURNETT: The fentanyl weight of sales to the
4 pharmacies that were terminated after Mr. Doud's departure.

5 THE COURT: And the third?

6 MR. BURNETT: I think there should be just -- you may
7 have multiple copies there.

8 THE COURT: So you have the fentanyl weight. I'm just
9 trying to understand the import and the relevance. Why is
10 8A different than the second longer one?

11 MR. BURNETT: The second longer one is the weight of
12 sales to all pharmacies that were terminated after Mr. Doud's
13 departure which is relevant to the argument that, as Ms. Pompeo
14 stated, the problems that many of those pharmacies predated
15 their termination and were present while Mr. Doud was there.

16 THE COURT: These are the weight of the drugs that
17 were ordered and shipped during these years?

18 MR. BURNETT: Yes, that's correct.

19 THE COURT: And the first one is what?

20 MR. BURNETT: The first one is that same information,
21 but as it pertains to the eight pharmacies that are listed in
22 Government Exhibit 908 which is the summary chart that she was
23 going to present about.

24 THE COURT: I'm sorry, 908?

25 MR. BURNETT: Yes.

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1 MR. GOTTLIEB: Your Honor, they've already introduced
2 the chart, so now they want to introduce the chart but minus
3 all the other things, just highlighting one, two, three, six or
4 seven of the pharmacies. Where do they come off calling a
5 paralegal to be testifying about a chart that's already been
6 in. There's already been testimony.

7 THE COURT: She's not testifying about a chart that's
8 already in. She's testifying about a new chart she created.

9 MR. GOTTLIEB: It all pertains to the chart that's
10 already in. There's already been testimony about it.

11 THE COURT: But this goes straight to the weight of
12 the fentanyl.

13 MR. GOTTLIEB: That's already in. They already
14 introduced the chart with all the pharmacies that were sold
15 fentanyl. That's already in evidence. Now they want to argue
16 to the jury like in summation with these particular
17 highlighting what's already in that chart, here's another
18 exhibit that we can add on for you.

19 THE COURT: Why is that illegal to do?

20 MR. GOTTLIEB: It's not illegal. It's repetition.
21 It's improper.

22 THE COURT: Why is that improper?

23 MR. GOTTLIEB: It's regurgitation of the old
24 testimony.

25 THE COURT: No, it's a different exhibit. I'm going

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1 to allow it. I'm going to allow those exhibits. I'm going to
2 allow minimal testimony about those exhibits. This is not --
3 as far as I'm concerned, the only relevant testimony of this
4 witness is that she created these two exhibits and she can
5 explain what those exhibits are supposed to reflect, and then
6 the parties obviously have their right to argue with regard to
7 the underlying facts. These exhibits being based on items that
8 are already in evidence, and argument import of those
9 underlying facts.

10 Let's get the witness back in the box and get the jury
11 in here so we can finish.

12 Let's bring in the jury.

13 (Continued on next page)

M1QBDOU4

Cutler - Cross

1 (In open court; jury present)

2 THE COURT: Mr. Janey, any further questions for this
3 witness.

4 MR. JANEY: I do, your Honor. Thank you.

5 BY MR. JANEY:

6 Q. Good afternoon, Mr. Cutler.

7 A. Good afternoon.

8 Q. If we could see slide 8 of Government Exhibit 903, please.
9 Do you have that there, Mr. Cutler?

10 A. Yes, I do.

11 Q. With respect to this slide, I just want to try to clarify
12 what it shows with respect to the bar chart on the right-hand
13 side that's labeled opioid sales 10 percent of the total
14 revenue of 2010 to 2016. Do you see that?

15 A. Yes, I do.

16 Q. Is it fair to say that for the year 2014 which is really
17 what I would describe as the peak year, if that's fair to say,
18 that the percent of opioid sales overall as a percent of total
19 revenue for RDC is the 11.6 number; is that correct?

20 A. That's correct.

21 Q. And the second highest number is the 2015 year, and that's
22 10.8, correct?

23 A. That's correct.

24 Q. And the opioid sales for RDC falls substantially in the
25 2016 year to less than 8 percent; is that correct?

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Cutler - Cross

1 A. Again, without reference to substantial which is a personal
2 choice, it does fall to 7.9 percent.

3 Q. Thank you. If I can see slide 11, please.

4 Now, slide 11 is -- well, let me ask. Again, what is
5 slide 11, Mr. Cutler?

6 A. This is my estimate of the amount of the bonus for the
7 defendant that would have come from the direct effect of the
8 revenue to RDC from controlled substances.

9 Q. By the direct effect going back to what we discussed prior
10 to the lunch break, is it fair to say that you mean the result
11 of the mathematical calculation that you did calculating the
12 contribution of controlled sales to the company's profits?

13 A. That's correct.

14 Q. If I can ask to be sure -- well, let me ask it this way.
15 Assume for the moment, Mr. Cutler, that oxycodone and fentanyl
16 were sold at cost or cost minus, would that change this chart?

17 A. What I've done here is, I've assumed based on evidence that
18 I saw that the profits to RDC were approximately the same if
19 not slightly higher for opioids or controlled substances than
20 for the business as a whole.

21 Q. When you looked at the data -- and we'll get into the data
22 in a moment -- did you observe whether the controlled
23 substances oxycodone and/or fentanyl were sold to pharmacies at
24 cost or cost minus?

25 A. The page that I saw did have the net profits of both

M1QBDOU4

Cutler - Cross

1 generic opioids and specifically of fentanyl.

2 Q. I'm not sure that answers my question. Did you observe in
3 looking at the data that RDC sold fentanyl and/or oxycodone to
4 its pharmacy customers at either cost or cost minus?

5 A. The data had the revenue, so I didn't observe the price,
6 but I did observe the total revenue.

7 Q. So is it fair to say judging from your testimony that you
8 did not make an observation about or did not have the data
9 available to you as to the cost at which RDC sold the fentanyl
10 or the opioids to its customers?

11 A. That's correct. I did not know the price. I knew the
12 total revenue.

13 Q. Is it fair to say then that it's challenging at best to
14 calculate the profit of the oxycodone or fentanyl unless you
15 know the cost?

16 A. No, that's not correct because on the sheet that I
17 reviewed, it, in fact, had the profits for those.

18 Q. Is it fair to say that you don't know whether there were
19 further deductions on the sheet that you're referring to that
20 might reflect that those were sold at cost or cost minus?

21 A. If that sheet was inaccurate, then that would not -- then
22 that would factor in. Taking the sheet --

23 Q. I'm sorry. Let me continue. Let me then go back to my
24 earlier question.

25 Assume for the moment that oxycodone and fentanyl were

M1QBDOU4

Cutler - Cross

1 sold at cost or cost minus, would this slide, slide 11 that's
2 in front of you change?

3 MR. BURNETT: Objection, asked and answered.

4 THE COURT: Overruled. You can answer the question.

5 A. No, it wouldn't because this slide is based not on what
6 it's sold for, but on the profits.

7 Q. I don't mean to tussle with you. I understand how you're
8 describing the chart. I want to be sure we're not talking past
9 each other.

10 Is it fair to say that if you had calculated -- take
11 the chart off. If you had calculated the contribution to
12 Mr. Doud's -- the direct contribution, the mathematical
13 calculation, assume for the moment the oxycodone or the
14 fentanyl were sold at cost or cost minus, would there be a
15 direct -- that is a mathematical calculation -- a direct
16 contribution of the oxycodone and/or the fentanyl to Mr. Doud's
17 bonus?

18 A. I'm going to rephrase it because I don't think I can agree
19 or disagree with your statement. I was given numbers from RDC
20 about the profitability of opioids. If those numbers are
21 incorrect, that would change my view. Assuming the numbers
22 were correct, my view is what I laid out.

23 Q. Do you know whether you were given cost data for oxycodone
24 or fentanyl?

25 A. I was given revenue data and expense data, so in there

M1QBDOU4

Cutler - Cross

1 would have been the cost.

2 Q. I'm not sure you're directly answering my question because
3 I know that you know what cost data is, correct?

4 A. Yes.

5 Q. Were you given cost data for fentanyl and/or oxycodone?

6 A. I was given total revenue, so not the cost. I was given
7 the total revenue.

8 Q. Thank you.

9 MR. JANEY: If I can have a moment, your Honor?

10 THE COURT: Yes.

11 Q. In the course of some of your direct examination, I
12 understood your testimony to be in the discussion as it pertain
13 to red flags that you, as a part of your review, that you took
14 into account the testimony in this case from Ruth Carter and
15 Jessica Pompeo; is that correct?

16 A. That is correct.

17 Q. And you took that into account to better understand the
18 data; is that fair to say?

19 A. Yes, that's correct.

20 Q. Including both numeric and non-numeric information about
21 red flags, orders of interest; is that correct?

22 A. That's correct.

23 Q. Now, when you took into account the testimony of Jessica
24 Pompeo and Ruth Carter to make those assessments for the
25 purposes of your analysis, did you take into account the cross

M1QBDOU4

Cutler - Cross

1 examination of those witnesses?

2 A. I was shown parts of their testimony, including all the
3 parts that were related to those discussions.

4 Q. I want to be clear. So you say you were given parts of
5 their testimony, correct?

6 A. That's correct.

7 Q. Were you given their testimony -- withdrawn.

8 Were you given Ruth Carter's testimony in her entirety
9 in this case?

10 A. No, I don't believe I had the entirety of her testimony.

11 Q. Were you given the entirety of Jessica Pompeo's testimony
12 in this case?

13 A. No, I don't believe I was given the total transcript of her
14 testimony.

15 Q. How many pages approximately with respect to Ruth Carter
16 were you given to review to take into account their testimony
17 so that you would have potentially a better assessment for red
18 flags, orders of interest, etc?

19 A. So I didn't count the pages. I would guess it was on the
20 order of 20 pages.

21 Q. And with respect to Ms. Pompeo?

22 A. There were more because there were more instances. I would
23 guess it was on the order of 40 pages.

24 Q. More instances of what?

25 A. Where those two topics were brought up.

M1QBDOU4

Cutler - Cross

1 Q. Do you have a recollection as you sit here right now as to
2 whether any of those pages included cross examination?

3 A. I don't recall seeing any that included cross examination.

4 Q. If I could have what's marked and admitted as Government
5 Exhibit 905.

6 MR. BURNETT: Your Honor, this isn't in evidence.

7 MR. JANEY: I'm sorry. Okay. Thank you for that.

8 This is only shown to counsel and the witness.

9 Q. You testified extensively this morning about Exhibit 905,
10 and in particular a 41 page document labeled customer metrics
11 from sales, order of interest and dispensing data. Do you
12 recall that?

13 A. I think you said 905 and I just want to correct that it was
14 906.

15 MR. JANEY: I'm sorry, your Honor, marking for
16 identification Defense T8, showing the witness.

17 Q. Do you recognize this document, Mr. Cutler?

18 A. The one that's on the screen is Government Exhibit 905. I
19 do recognize that.

20 Q. What is this, Mr. Cutler?

21 A. It's a very similar chart to what we were looking at this
22 morning except it breaks out by year as opposed to just giving
23 the total.

24 MR. JANEY: Your Honor, we request that what's been
25 premarked as Defense T8 be admitted in evidence?

M1QBDOU4

Cutler - Cross

1 THE COURT: Any objection?

2 MR. BURNETT: No objection, although it just has the
3 wrong exhibit label on it because it says 905.

4 THE COURT: This is exhibit which?

5 MR. BURNETT: I'm just pointing out that it will say,
6 for the record, that it will say Government Exhibit 905. If
7 they want to call T8.

8 MR. JANEY: For the record, it will be marked Defense
9 T8.

10 THE COURT: Mark it at a later point. It will be
11 admitted into evidence.

12 (Defendant's Exhibit T8 received in evidence)

13 MR. JANEY: Can we publish this to the jury, your
14 Honor.

15 THE COURT: Yes.

16 Q. Do you have it, Mr. Cutler?

17 A. Yes, I do.

18 Q. Now that the jury has it just for orientation, this is one
19 of the pharmacies that you described and did analysis on in
20 your 41 pharmacy case study; is that correct?

21 A. That's correct.

22 Q. And the title here is customer metrics from sales, order of
23 interest, and dispensing data, correct?

24 A. That's correct.

25 Q. And in putting together the analysis, what was -- again I

M1QBDOU4

Cutler - Cross

1 know you testified about it on direct, but for orientation,
2 what was the purpose of this analysis?

3 A. The purpose was to see whether there would be red flags
4 that came across in looking at specific pharmacies.

5 Q. Now, what I'd like to try to understand, Mr. Cutler, is
6 some of what's going on in the chart, because is it fair to say
7 your testimony is that this chart for Alden pharmacy describes
8 red flags and it describes them by year, correct?

9 A. That's correct.

10 Q. Is it fair to say that red flags occur at moments in time?

11 A. They occur over a period of time.

12 Q. So there's some duration aspect to red flags; is that fair
13 to say?

14 A. Yes.

15 Q. By way of example, if this were January, which it is, a red
16 flag could occur in January, cease being a red flag by February
17 and potentially become a red flag again in June; is that fair
18 to say?

19 A. Yes, it is. Some of course extend over a longer period of
20 time.

21 Q. Just to illustrate the point, when you measure the red
22 flags here, and let's just take the 2013 year and we can take
23 the first column controlled substance shares of sales and 2013
24 10.7 percent. Do you see that there?

25 A. Yes, I do.

M1QBDOU4

Cutler - Cross

1 Q. When you say for 2013 Alden pharmacy had controlled
2 substance sales of -- it indicates here only 10.7 percent,
3 correct?

4 A. That's correct.

5 Q. So it didn't trigger the red flag; is that correct?

6 A. That's correct.

7 Q. Whether it triggered the red flag or not, if it triggered
8 the red flag, let's say for example, for the percent of opioid
9 dosage units flagged as above limits that were shipped in 2015,
10 you have 100 percent; is it fair to say that could have
11 occurred only one time?

12 A. It could have occurred only one time. I haven't indicated
13 how many times in this.

14 Q. So what does the 100 percent mean if anything?

15 A. That means in calendar year 2015 all the dosage units that
16 were flagged, 100 percent wound up being shipped.

17 Q. And that could have occurred within a discrete month,
18 correct?

19 A. That's correct.

20 Q. And all the other months during the year that condition
21 might not have existed; is that fair to say?

22 A. So the flag applies to each order. So, in fact, if it
23 applied to an order and then that order was dealt with, then
24 the flag would turn off.

25 Q. Right, but this doesn't -- well, let me ask it this way.

M1QBDOU4

Cutler - Cross

1 Does this take into account whether the flag turned off?

2 A. The only -- it does because the only thing here are the
3 units that are flagged. So if a subsequent unit was not
4 flagged, it would not contribute to this at all.

5 Q. Let me ask the question this way, and I apologize for not
6 being clear.

7 If there were 50 units shipped in 2015 but only 10
8 units were flagged, does this chart take into account that only
9 that number was flagged potentially only for a 30 day period?

10 A. That particular row does not because that particular row is
11 looking only at the orders that are flagged.

12 Q. But it doesn't take it into account?

13 A. The previous chart did take it into account.

14 Q. What chart is that?

15 A. The one on the prior page that shows the month specific
16 estimate.

17 Q. Do you have that? Can you direct me?

18 A. In Government Exhibit 906.

19 Q. Let me see 906, please.

20 A. You can see here, this is what we had looked at, the first
21 page of each one. This shows you each of the monthly orders,
22 and then you can tell in each month whether there were orders
23 that were flagged or not, so you can see there for Alden
24 pharmacy there were two specific months in 2015 where orders
25 were flagged.

M1QBDOU4

Cutler - Cross

1 Q. So can we go back to 905. If the other chart shows
2 duration, for lack of a better word, why isn't this chart
3 misleading insofar as that it suggests that these triggers are
4 made but not indicating specifically in this case Alden
5 pharmacy that the flag might have turned off or that these
6 occurred for a short period of time?

7 A. I don't think there's anything misleading about it. I was
8 trying to give a summary number which is, if an order was
9 flagged, what happened to that order. So that's all I'm trying
10 to do here is say, if an order got flagged, what happened.

11 One can tell how many orders are flagged from that
12 chart you were just looking at. I'm not hiding that. I'm just
13 showing it in two different charts.

14 Q. I didn't suggest that you were hiding anything. Can we
15 look at the next chart Brighton pharmacy. This is slide 2 of
16 the same 41 examples of case study.

17 So here again the 100 percent for the percent of
18 opioid dosage units flagged as above the limits that were
19 shipped; 100 percent in 2014, 100 percent in 2015.

20 Again, how should the jury understand the 10 percent
21 number?

22 A. It is exactly what it says which is if an order came in and
23 was flagged because it was above the limit, what ultimately
24 happened to it. And out of everything that was flagged in
25 2014, all of it was shipped. And out of everything that was

M1QBDOU4

Cutler - Cross

1 flagged in 2015, all of it was shipped. That's what those rows
2 say. Nothing more. Nothing less than that.

3 Q. So all it's saying is that something was flagged, which
4 you're not making by way of this testimony in this proceeding,
5 you're not making any statements or providing an opinion about
6 the underlying investigation in connection with the red flag or
7 what was done after the red flag or whether these prescriptions
8 were legitimate or illegitimate, correct?

9 A. That's correct. I'm not testifying at all as to what RDC
10 did once the red flag became apparent.

11 Q. If we can go to 906, please to slide 60. I believe that
12 this is admitted in evidence.

13 Do you have slide 60 there, Mr. Cutler?

14 A. Yes, I do.

15 Q. Now, this is a chart with respect to Linden Care, correct?

16 A. That's correct.

17 Q. And it's some version of the Alden pharmacy chart that we
18 were looking at but in a more summary fashion; is that fair to
19 say?

20 A. Yes.

21 Q. And here when you were testifying on direct with respect to
22 Linden Care, your testimony was that Linden Care was a
23 specialty pharmacy pain management platform, correct?

24 A. That's as I understand Linden Care.

25 Q. Based on your review of the documents provided by the

M1QBDOU4

Cutler - Cross

1 government in this case, correct?

2 A. Some of the documents were also provided by RDC, so I
3 don't -- not just provided by the government.

4 Q. The documents you reviewed?

5 A. The documents I reviewed, correct.

6 Q. And your testimony was that certain of these metrics may
7 seem large or triggering, but are not given that Linden Care
8 specifically is a pain management platform. Do you recall that
9 testimony?

10 A. Yes, I do.

11 Q. So for the jury, can you explain based on your experience
12 and your knowledge, your research, what you've written, what is
13 a pain management platform?

14 A. It is kind of what the name implies. In this case the
15 pharmacy as I understand it was directed at providing
16 medications to people who were primarily seeking pain
17 management.

18 Q. Just to pull the thread on your earlier testimony with
19 respect to a pain management platform, why would certain
20 potential red flags be higher than we might otherwise expect,
21 let's say, as compared to a non-specialty or pain management
22 pharmacy?

23 A. Obviously if you're treating a lot of patients who need
24 pain management, then the share of controlled substances will
25 be higher than for pharmacies treating just the general set of

M1QBDOU4

Cutler - Cross

1 patients in the community.

2 Q. Again, you've testified that Linden Care based on what you
3 reviewed was one of the largest customers for RDC, correct?

4 A. As I understand it, that's correct.

5 Q. And so in that context in giving that some of the red flags
6 that might be triggered to RDC with respect to Linden Care
7 would not -- based on your knowledge, research and experience,
8 necessarily be alarming; is that fair to say?

9 A. Yes. This morning when that came up, that's why I focused
10 on the ones that would not be as alarming.

11 Q. And again, those that would not be as alarming based on
12 your experience, knowledge and research, what are those?

13 A. The two that I thought would be less alarming here, the
14 first one being the controlled substance share of sales,
15 because obviously if you're in pain management there will be
16 more controlled substances. And second because it was mail
17 order, the out of state share of schedule 2 prescriptions.

18 Q. Your testimony earlier with respect to the 30 percent, this
19 going to the controlled substance share of sales, the 30
20 percent, is it fair to say that that statistic was based on and
21 you compiling these slides, non-specialty pain management
22 platforms; is that fair to say?

23 A. The 30 percent came from RDC and it also came from Ruth
24 Carter, and I believe they were talking in general about
25 pharmacies and they were not talking specifically about pain

M1QBDOU4

Cutler - Redirect

1 management pharmacies.

2 MR. JANEY: We can take that dow, please. No further
3 questions for this witness.

4 THE COURT: Any further questions for this witness?

5 MR. BURNETT: Thank you, your Honor.

6 REDIRECT EXAMINATION

7 BY MR. BURNETT:

8 Q. Good afternoon, Professor Cutler.

9 A. Good afternoon.

10 Q. So there are a number of things I want to touch on, but why
11 don't we start with Government Exhibit 905 which I think was
12 remarked Defense Exhibit T8.

13 A. Okay.

14 Q. Do you recall that just a few moments ago Mr. Janey asked
15 you a few questions about whether you examined red flags
16 appearing over time at different pharmacies?

17 A. Yes, I do.

18 Q. What was the purpose of creating this set of exhibits here?

19 A. The purpose was really to look over more periods of time so
20 I could see was this a continuing issue or was this just a one
21 time issue or how repeated were these.

22 Q. If there were issues that were repeated over time, how
23 would that be reflected in the chart?

24 A. You would then see red in multiple years.

25 Q. Did you see that for a number of the pharmacies that

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Cutler - Redirect

1 appeared in here?

2 A. Yes, I did, for many of the pharmacies that we were talking
3 about this morning where you see the red. They appear in many
4 different years.

5 Q. So let's just take a couple of examples. Can we turn to
6 page 13. Is this Bay Ridge pharmacy?

7 A. That's correct.

8 Q. Was there some consistency to the red flags with respect to
9 Bay Ridge?

10 A. Yes. For example, if you look at the last two rows, the
11 share of oxycodone prescriptions with 180 plus pills. Remember
12 120 is in the documents, so 180 is very conservative. It went
13 above 20 percent and that was for each of the four years; which
14 share of the prescriptions were written by doctors who were
15 flagged by RDC by 5 percent. It's actually very consistent
16 across the years. It ranges only from 28 1/2 to 32 1/2, so
17 it's very consistent and extremely high across all the years.

18 Q. Let's go to page 18 for Seventh Elm pharmacy, was there
19 consistency on this chart too?

20 A. Yes. You see here first the controlled substance share is
21 very high. Interestingly it doesn't trigger 30 percent in each
22 year, but it's still very high. But again, you see the out of
23 state share of schedule 2 prescription is well above 5 percent
24 every year.

25 The share of oxycodone prescriptions with 180 plus

M1QBDOU4

Cutler - Redirect

1 pills exceeds in every year except one where it's just slightly
2 below. The share of prescriptions to doctors who were flagged
3 by RDC greatly exceeds 5 percent. It's above 28 percent in
4 each of the four years, so there's in fact quite a lot of
5 consistency over time here.

6 Q. How about page 28. This is ProHealth pharmacy, right?

7 A. This is ProHealth pharmacy and we also looked at that this
8 morning. The controlled substance share is high. It's red in
9 all of the years. The cash share of both all schedule 2
10 prescriptions and oxycodone prescriptions especially are high
11 in every year. The out of state share is high every year. The
12 single dominant thing that comes across here is how constant
13 these are across the years.

14 Q. Let's just look at one more example Old Town pharmacy on
15 page 31. Did you see some consistency here as well?

16 A. Once again, the single thing that most jumps out here is
17 just the consistency across years. What you see in one year,
18 almost invariably you see in other years.

19 Q. Let's take that down. I'd like to next go to Government
20 Exhibit 903 and take a look at slide 7.

21 Do you recall you were asked a number of different
22 questions by Mr. Janey about your comparison of RDC opioid
23 sales to the rest of the industry?

24 A. Yes, I do.

25 Q. I want to clear a few things up. First, you focused on

M1QBDOU4

Cutler - Redirect

1 just three states here; is that right?

2 A. That's right.

3 Q. You started to say this was the fairest comparison but you
4 didn't get to finish. Why do you think that's the fairest
5 comparison?

6 A. RDC was predominantly selling in three states; New York,
7 New Jersey and Pennsylvania. So if I wanted to see whether
8 what RDC was doing was different than what other distributors
9 were doing, it seem fairest to limit the other distributors to
10 those that are distributing in the same areas.

11 For example, if there had been more distribution in
12 California, but RDC is not in California or less distribution,
13 that wouldn't be a fair comparison to RDC.

14 Q. Now, do you recall that you were asked about production
15 quotas?

16 A. Yes, I was.

17 Q. What are those?

18 A. For controlled substances, the DEA authorizes a certain
19 amount of production each year based on how much it thinks will
20 be distributed.

21 Q. Is it right to use production quotas for this type of
22 analysis you were doing it?

23 A. No, it's not.

24 Q. Why not?

25 A. A production quota is the total amount and it applies to

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Cutler - Redirect

1 the entire country, so that they're saying how much in total
2 fentanyl or oxycodone there can be.

3 What's going on here is a particular distributor is
4 saying how much of this should I distribute. What that total
5 is, is irrelevant. The pharmacy makes the order, and then the
6 distributor has to decide, is this a valid order that I should
7 fill. And what the DEA has said is, the total amount that can
8 be produced does not enter into that decision at all you.

9 (Continued on next page)

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M1q3dou5

Cutler - Redirect

1 Q. I actually want to take a look at some of those production
2 quotas you were shown.

3 MR. BURNETT: Can we please take a look at Defense
4 Exhibit T1. And let's highlight the -- or not highlight. Zoom
5 in on the lines for oxymorphone, or, sorry, oxycodone sales.
6 Can you scroll down just a tiny bit.

7 Q. Do you see that this shows oxycodone sales between 2009 out
8 to 2019. Sorry. Not sales. The production quota?

9 A. That's correct.

10 Q. What's the production quota -- sorry. What's the
11 production quota in 2010?

12 A. In 2010, which is the second column, it is 105.5 million.

13 Q. What's the production quota in 2015?

14 A. 2015, it's 141.375.

15 Q. About how large an increase is that?

16 A. About 40 percent.

17 Q. Let's go back to slide seven we were looking at Government
18 Exhibit 903. How does that compare to the increase in RDC's
19 oxycodone distribution during the same time period?

20 A. It's much smaller. RDC increased by 115 percent in
21 comparison to the roughly 40 percent.

22 Q. Let's pull T1 back up, please. And take a look at the
23 fentanyl line now which I believe is a little further up the
24 page. Do you see the entry for 2010?

25 A. 1.428.

M1q3dou5

Cutler - Redirect

1 Q. And then how does that compare to the entry for 2015?

2 A. That's 2.3.

3 Q. So about how big an increase is that?

4 A. Oh, that's on the order of 1.4. So call it 60 percent.

5 Q. Let's goes back to Government Exhibit 903. Slide seven.

6 Can you compare the size of the production quota increase to
7 the size of the increase in RDC's shipments of fentanyl?

8 A. Yeah, RDC's shipments of fentanyl increased by 222 percent
9 in comparison to the roughly 60 percent quota increase.

10 Q. Now, with respect to this chart, you were also asked about
11 CDC prescription data; is that right?

12 A. That's correct.

13 Q. What is that?

14 A. Oh. CDC got data from a company on the number of
15 prescriptions for opioids in each year, in each state, so they
16 made that data available.

17 Q. Now, before we talk more about the details of that data,
18 based on your work and research, are all opioid prescriptions
19 written for legitimate medical purposes?

20 A. No, they're not.

21 Q. What are some of the illegitimate reasons they're written?

22 A. So opioids can be abused, obviously, and as we were talking
23 about yesterday, they can lead to addiction and death if taken
24 in overdose. Nonetheless, they're also drugs that increase --
25 that make people high. So people will take them to abuse them

M1q3dou5

Cutler - Redirect

1 as kind of like heroin. These are substances closely related
2 to heroin. So people will sometimes try to get a prescription
3 of oxycodone or fentanyl and then abuse it in the same way they
4 would abuse heroin.

5 Q. Does the CDC's prescription data include only prescriptions
6 that are written for legitimate medical purposes?

7 MR. JANEY: Objection. Beyond scope of the cross,
8 your Honor.

9 THE COURT: Overruled. He can answer that.

10 THE WITNESS: Oh, I'm sorry. I couldn't hear you.

11 THE COURT: Yes.

12 A. Okay.

13 No, it includes all prescriptions.

14 Q. Now, do you recall that Mr. Janey put a few documents in
15 front of you that were CDC prescription data?

16 A. Yes, I do.

17 Q. And specifically asked you questions about how
18 prescriptions for opioids changed in Pennsylvania specifically
19 between 2010 and 2013; is that right?

20 A. That's correct.

21 Q. Now, before we look at some of that data, did your analysis
22 only focus on Pennsylvania?

23 A. No, it focused on the three states, New York, New Jersey
24 and Pennsylvania.

25 Q. Was your analysis limited to 2010 to 2013?

M1q3dou5

Cutler - Redirect

1 A. No, I looked at all years from 2010 through 2017.

2 Q. So, there is a folder in front of you, and the folder I
3 believe is also with the Court and defense counsel. In that
4 folder is Defense Exhibits T2, T3 and T4, which is the CDC data
5 already in evidence. You should also see a few government
6 exhibits, specifically Government Exhibits 910, 911 and 12.
7 912. Do you see that?

8 A. I do. I have two folders. I'm not --

9 THE COURT: Can you get that?

10 THE WITNESS: I wondered why I had two folders.

11 MR. BURNETT: Not so good on logistics.

12 Q. So, why don't you take a look first at Government Exhibits
13 910 and 911. Can you just say if you recognize those.

14 A. Yes, I do. These are the same things that we were looking
15 at but they are for later years.

16 Q. Specifically, are they for 2014 and 2015?

17 A. That's correct.

18 MR. BURNETT: At this time the government offers
19 Government Exhibits 910 and 911.

20 THE COURT: Any objection?

21 MR. JANEY: No objection.

22 THE COURT: It will be admitted in evidence.

23 (Government's Exhibit 910, 911 received in evidence)

24 Q. If you take a look at Government Exhibit 912, you'll see
25 that's a chart. What I am going to ask you to do is if you

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Cutler - Redirect

1 could please take a look at the information in the chart on
2 Government Exhibit 912, and compare that to the information
3 that you see on the three defense exhibits I mentioned and
4 those two new government exhibits.

5 A. I'm sorry. I just need to find 912.

6 Q. It should be a little chart.

7 A. My apologies. I skipped right by it. My apologies. Okay,
8 I have it right here.

9 Q. If you could just take a moment to yourself to look to
10 compare the data on those charts to the data in the other
11 exhibits.

12 A. Hmm-hmm. Okay.

13 Q. Does the data match up?

14 A. Yes, it does.

15 MR. BURNETT: The government offers Government Exhibit
16 912.

17 MR. JANEY: No objection, your Honor.

18 THE COURT: It will be admitted in evidence.

19 (Government's Exhibit 912 received in evidence)

20 MR. BURNETT: If can you please put Government Exhibit
21 912 on the screen for the jury and all the parties and the
22 witness.

23 Q. Now, Professor Cutler, can you please explain what the data
24 on Government Exhibit 912 reflects?

25 A. So these are the same prescription data that we were

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Cutler - Redirect

1 looking at earlier. These are for the three states at issue
2 here, Pennsylvania, New York and New Jersey, in each year from
3 2010 through 2015.

4 Q. Do you see there are four entries highlighted?

5 A. That's correct.

6 Q. What do those entries reflect?

7 A. Those are the entries that I was asked about by the defense
8 counsel.

9 Q. So now, 2010 to 2015, that's the time frame that you looked
10 at for the chart you created, right?

11 A. That's correct.

12 Q. So can you describe how the dispensing rate changed in
13 Pennsylvania between 2010 and 2015.

14 A. It rose very slightly from 2010 to 2012, and then it
15 declined much more from 2012 to 2015. So that overall, there
16 was a net decline in opioid prescribing in Pennsylvania over
17 that time period.

18 Q. How about in New York and New Jersey, the other two states
19 you analyzed?

20 A. Exactly the same pattern. In New York it rose very
21 slightly from 2010 to 2012 and then declined much more. In New
22 Jersey it rose very slightly from 2010 to 2011 and then
23 declined much more.

24 Basically there was a peak in prescribing of opioids
25 in the United States around 2011, 2012, and then opioid

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Cutler - Redirect

1 prescribing went down quite substantially.

2 Q. And looking back at the chart on Government Exhibit 903,
3 slide seven. Is the full set of data that you saw in
4 Government Exhibit 12 consistent with the data that you charted
5 out here?

6 A. Yes. You see those declines in each of the -- particularly
7 in the first set of bars there for the rest of the industry.
8 That decline in MME shipments is very strongly like the decline
9 in the prescriptions that we were just looking at on the prior
10 page. They are both telling the same story, which is over this
11 time period, prescriptions were falling, shipments were
12 falling, and then obviously with the exception of RDC.

13 Q. Let's go ahead now to slide 11. And this is the slide that
14 you testified about earlier, estimates the portion of
15 Mr. Doud's bonus that's directly attributed to controlled
16 substance sales; is that right?

17 A. That's correct.

18 Q. Do you recall you were asked some questions about assuming
19 something about cost earlier?

20 A. Yes.

21 Q. Can you just explain what it is that you did to analyze the
22 actual profits on RDC's controlled substance sales?

23 A. So, remember we were looking at the net earning statements,
24 so we saw the net earnings, and I spoke about how that
25 translates into the bonus for the defendant. So what I did

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Cutler - Redirect

1 here was I said, well, what share of those net earnings came
2 from opioids, because that's what I need to know. I know the
3 net earnings translated into the bonus. So what share came
4 from opioids. That depends on how profitable are opioids
5 relative to non-opioids. If opioids have no profit, there is
6 no contribution. And if they have a high profit, there is a
7 high contribution.

8 I looked at that, and it looks, based on the data from
9 RDC, that the profits from opioids were roughly similar to the
10 profits from non-opioids. So therefore, whatever revenue came
11 from opioids roughly translated by the same amount into net
12 earnings for the company as revenue from non-opioids.

13 Given that, I could then say, okay, what share of the
14 revenue to RDC is from opioids. And that was in those years
15 10, 11 percent. So therefore, that's a reasonable estimate of
16 the contribution of opioids to the overall profits, and,
17 therefore, to the bonus for the defendant.

18 Q. In order to do that analysis, do you need information on
19 costs specifically or did you have other data that allowed you
20 to make that comparison?

21 A. We had other data, which is the data from RDC that says
22 here's how much money we made from selling these, and here's
23 how much we paid for them, and here's what our costs were. So
24 I had all the information I need to calculate profit. I have
25 the revenue that they got, and I have the expenses. And so

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Cutler - Redirect

1 given that, I can just subtract and get the profits.

2 Q. And to be clear, in the context of a drug distributor like
3 RDC, is the upfront cost that RDC pays a manufacturer for the
4 drug an accurate measure of RDC's overall costs on purchasing?

5 A. No. Because a lot of the way that a distributor makes
6 money is they pay the list price, but then they get discounts.
7 So they'll get discounts for prompt pay or they'll get
8 discounts for buying in large bulk. So, there is the price
9 that's paid, but then there is the discount. The price sold to
10 the pharmacy is kind of like the first of those price paid. So
11 that discounts then winds up being the net, part of the net
12 revenue for the company.

13 Q. Now, this chart here only reflects the direct contribution
14 from controlled substance sales to the bonus; is that right?

15 A. That's correct.

16 Q. You also mentioned on direct examination that there were
17 other ways that the controlled substance sales could influence
18 the bonus overall; is that correct?

19 A. That's correct.

20 Q. When Mr. Janey was asking you about that he was using the
21 term bundling, which I don't think is one that you used on
22 direct examination. Could you just explain how it is the sales
23 of controlled substances can influence the sales of
24 non-controlled substances?

25 A. Yeah. Let me give you an analogy. So think about grocery

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Cutler - Redirect

1 stores and you want to go buy weekly groceries. It may be
2 possible that one store sells fruits and vegetables and one
3 store sells meat and one stores sells packaged goods, but you
4 could go to one. As a family, we would rather go to one place.
5 Look, I want to buy all my groceries at one place.

6 So being a full service supermarket is beneficial
7 because the customers only have to deal with one place, rather
8 than going separately to get their fruits and vegetables and
9 their meats and their packaged goods.

10 That's what I was referring to here, which is a
11 pharmacy is the same way. Many pharmacies do not want to go to
12 one supplier for their opioids and another supplier for other
13 things and another supplier for something else. They prefer to
14 deal with one full service distributor, just as families prefer
15 to deal with one full service supermarket.

16 And so that's the way this contributes, by being a
17 full service company, where you can get opioids and
18 non-opioids, it helps to earn that business.

19 Q. I want to wrap up by asking a couple of questions about
20 slide 18, which is the last slide on this chart. I really want
21 to make sure it's clear on how it is you created this.

22 Am I right you said you had data on the pharmacies
23 that RDC terminated after Mr. Doud left the company? Is that
24 correct?

25 A. That's correct. So the base of this is all the pharmacies

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Cutler - Redirect

1 that were terminated in 2017, 2018, after Mr. Doud left the
2 company.

3 Q. And did you have data on the amount of opioids that RDC
4 sold to those pharmacies before they were terminated?

5 A. That's correct. So before they were terminated, I know
6 which pharmacies they are, and as we were showing with the
7 data, we know what RDC's sales were to each of those companies,
8 in each year. Each of those pharmacies in each year.

9 Q. So what did you do to create this chart?

10 A. So I took all those companies that were terminated, and I
11 said what were RDC's sales of opioids if you were terminated in
12 2017 or 2018. What were your sales of opioids in, for example,
13 2014. And then I compared that to the universe of the entirety
14 of RDC's sales of opioids in 2014. So I said, what share of
15 the entirety of their opioid sales in 2014 were to those
16 pharmacies that they terminated after Mr. Doud left the
17 company.

18 Q. So to be clear, for 2015, for example, in that year,
19 73 percent of RDC's opioid sales went to pharmacies that were
20 terminated after Mr. Doud left the company?

21 A. That's correct. So roughly three-fourths of all the opioid
22 sales in that year were to companies that were terminated after
23 Mr. Doud left the company.

24 MR. BURNETT: No further questions, your Honor.

25 THE COURT: Any further questions of this witness?

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Cutler - Cross

1 MR. JANEY: Yes, your Honor. Thank you.

2 RE CROSS EXAMINATION

3 BY MR. JANEY:

4 Q. Can we keep that slide up, please.

5 Mr. Cutler, just very briefly, with respect to slide
6 18, you don't know in viewing the 2017 data or any data,
7 termination data for this slide, you don't know the reasons for
8 the termination's taking place, correct?

9 A. That's correct. I only know in the spreadsheet it says it
10 was terminated.

11 Q. You didn't do, as you've testified, any investigation as to
12 the bases for those terminations in 2017, correct?

13 A. That's correct, I did not do an investigation into that.

14 Q. And with respect to the earlier years, as you testified on
15 cross, you did not look at termination data, actual termination
16 data for the years that are displayed on this chart, correct?

17 A. That's correct. This chart does not show anything on
18 termination data in those years.

19 Q. You don't know who was involved or anything about the
20 underlying circumstance, correct?

21 A. I'm really not the best person to testify on those matters.

22 MR. JANEY: Thank you, your Honor.

23 THE COURT: Any further questions for this witness?

24 MR. BURNETT: No, thank you.

25 THE COURT: Thank you, sir. You can step down.

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Cutler - Cross

1 THE WITNESS: Thank you.
2 (Witness excused)
3 (Continued on next page)
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1 THE COURT: Will the government call its next witness.

2 MS. ROTHMAN: The government calls Michael Paulsen.

3 I think our witness is in the restroom, your Honor,
4 but he should be out momentarily.

5 THE COURT: Let's take a break. Ladies and gentlemen,
6 we'll take a 15-minute break. Don't discuss the case, keep an
7 open mind.

8 (Jury excused)

9 MR. ROOS: Your Honor, so one question. Not to rehash
10 everything we did this morning. But on this termination
11 spreadsheet, you know, I think we still, our view is still that
12 there is a bunch of inaccuracies in there. Some of those
13 pharmacies were reactivated and so I'm wondering if we'll have
14 an opportunity to -- particularly if there is no witness.

15 THE COURT: I'm sorry, opportunity to do what?

16 MR. ROOS: An opportunity to, I mean, both, first of
17 all challenge, the admissibility of that further based on the
18 inaccuracies, like a 403 argument. Or otherwise I think we
19 need to call a very brief rebuttal witness just to talk about
20 that document.

21 THE COURT: Okay.

22 MR. ROOS: If that's the route your Honor would like
23 us to go, I want to know if we should have that person ready to
24 go tomorrow as soon as their people are done.

25 THE COURT: Any rebuttal witnesses you think you might

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1 call should be ready to go tomorrow.

2 MR. ROOS: Yes, your Honor.

3 MR. GOTTLIEB: Your Honor, all I can say is, we've
4 been in touch with them. We trust we were going to have the
5 documents for tomorrow. If not, I would ask that we hold off
6 formally resting. We should have them.

7 THE COURT: Sure. If we finish this witness, the
8 government can hold off formally resting until tomorrow morning
9 if you'd like or you can rest this afternoon.

10 MR. GOTTLIEB: No, no, no.

11 THE COURT: I deal with both sides. The rules apply
12 to both sides. And if the defense wants to wait until Monday
13 morning to rest, you can do that. Okay.

14 MR. ROOS: I guess the thing is, if that document
15 comes in, we are going to want to rebut it. I hear your
16 Honor's preference of not having us call a rebuttal witness on
17 Monday. Is that right?

18 THE COURT: You are calling your witness tomorrow.

19 MR. ROOS: Okay.

20 THE COURT: So, I want to finish all witnesses
21 tomorrow. If we have the time.

22 MR. GOTTLIEB: Your Honor, I have to tell you, to hear
23 that they're saying on the document, which so clearly is
24 relevant now, that there is an objection because only a portion
25 of this business record is inaccurate, whereas their portion is

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1 just perfect, no inaccuracies at all, is raising this to a
2 level of absurdity. Having said that --

3 THE COURT: What do the rules of law say I'm supposed
4 to do about that?

5 MR. GOTTLIEB: At a certain point put an end to --

6 THE COURT: In what way?

7 MR. GOTTLIEB: -- to this game.

8 THE COURT: I don't know if we have this exhibit in
9 this case at this point. I don't know what you intend to do
10 with the exhibit. I don't know if you intend to lay a
11 foundation for this exhibit.

12 MR. GOTTLIEB: A business record, it's coming in, your
13 Honor, as --

14 THE COURT: You still have to be able to demonstrate
15 that. If you demonstrate that -- I hear you venting,
16 Mr. Gottlieb. I am just not sure what you want me to do about
17 it.

18 MR. GOTTLIEB: Well, your Honor, in light of the
19 comment that they may have a rebuttal witness, in fact now, I
20 may have a rebuttal witness.

21 THE COURT: What do you want me to do about that?

22 MR. GOTTLIEB: I'm informing the Court that this may
23 have to go another day.

24 THE COURT: No. I informed you -- see, you weren't
25 listening when I talk. I said the rules apply to both sides.

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1 If you intend to have a rebuttal witness testify, that rebuttal
2 witness should be ready and willing to testify tomorrow.

3 MR. GOTTLIEB: I ask that Jessica Pompeo be brought
4 here tomorrow as a potential witness. The person who prepared
5 this document. I am asking that she be available for us to
6 call. Clearly the government is in control of her and have
7 been in touch with her. If we have to subpoena her, we will.
8 That shouldn't be necessary. She should be here tomorrow.

9 THE COURT: You should get a representation from the
10 government before we adjourn as to whether or not they're going
11 to have her available if you want to call her as a witness
12 tomorrow. If they say for some legitimate reason that they
13 will not, then you can apply for a subpoena and I will put a
14 subpoena in your hand and you can tell her she has the
15 obligation to be available if you want to call her.

16 MR. GOTTLIEB: Thank you.

17 MR. ROOS: Can I say a few things about this. She has
18 a separate lawyer who represents her, and she lives in
19 Rochester. So, we don't own her.

20 But if the issue is Mr. Gottlieb is just getting at
21 the authentication, I was under the impression that the IT
22 person was going to be able to say, either by certification or
23 by testimony, that this meets the business record test that
24 your Honor was saying, so, maybe there --

25 THE COURT: My issue is not whether or not I am going

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1 to let in this document without any foundation. It is the
2 defense's obligation to establish the foundation for admitting
3 this document. Now, if you can't do it by stipulation, I don't
4 have any authority to force them to agree. So, then it's your
5 responsibility, since you've decided on the last day of trial
6 that this is what you want to present, it's your responsibility
7 to lay the proper foundation. If they don't want to stipulate,
8 and they lay the proper foundation, it will come in.

9 MR. GOTTLIEB: We did not decide at the last minute to
10 put this document in. The government produced to us a document
11 which included 2013. When they put it in formal evidence, that
12 document transformed into only beginning in 2017. Everything
13 else is the same.

14 I will point out to your Honor, as far as we are
15 concerned, the fact that the government took that out, the fact
16 that the government now continues to fight that is clearly
17 *Brady* material. That information tends to exculpate the
18 defendant.

19 THE COURT: Mr. Gottlieb, you know, you're venting
20 again.

21 MR. GOTTLIEB: No, I'm not, your Honor.

22 THE COURT: Okay. Well, let me tell you why you're
23 wrong. Two reasons. One, if it's *Brady* material, you already
24 have it. So, it's been disclosed to you. Okay. Wait a
25 minute. If it's *Brady* material, they have an obligation to

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1 disclose it. It has been disclosed.

2 You want to say, oh, no, we didn't do this at the last
3 minute. Well, if you didn't do this at the last minute, then
4 it's clear to me you knew the import of this document a week
5 ago. And -- wait a minute -- and you never raised that issue.

6 MR. GOTTLIEB: We didn't raise it because the document
7 has been changed. We got --

8 THE COURT: You knew, Mr. Gottlieb -- you didn't
9 listen to what I said. You knew that document was different a
10 week ago. A week ago. You could have raised this issue a week
11 ago.

12 MR. GOTTLIEB: No, your Honor.

13 THE COURT: You raised it with the witness that the
14 document was not the same document.

15 MR. GOTTLIEB: Your Honor, it's only during this
16 trial -- your Honor, respectfully, and I mean this, I have not
17 been clear enough. We had Government Exhibit 278.

18 THE COURT: When did you figure it out, Mr. Gottlieb?
19 What day?

20 MR. GOTTLIEB: When the government --

21 THE COURT: What day did you figure it out?

22 MR. GOTTLIEB: When they introduced it.

23 THE COURT: That was a week ago. That's all I said.
24 I said you knew a week ago.

25 MR. GOTTLIEB: Okay.

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1 THE COURT: All right. So that doesn't help you about
2 the timeliness. You could have raised this issue a week ago
3 when it was raised to you. You didn't wake up this morning and
4 decide that, oh, where is the document out there that I want.
5 You knew this.

6 MR. GOTTLIEB: Your Honor, but when I cross-examined
7 the witnesses, suddenly I was blocked in raising any questions
8 about it.

9 THE COURT: Well, no, no, no. I'm not going to let
10 that record stand. Who blocked you from raising that issue?
11 Who blocked you? Are you saying I blocked you?

12 MR. GOTTLIEB: No.

13 THE COURT: They can't block you.

14 MR. GOTTLIEB: Your Honor, we had a document. When
15 they introduced it, we saw that it had been changed.

16 THE COURT: Mr. Gottlieb, we all know what the facts
17 are. The facts are fairly obvious. All I'm saying to you is
18 don't argue that, oh, you're so disadvantaged because you only
19 found this out this morning. You didn't find this out this
20 morning. You had at least a week to deal with this. We could
21 have been talking about this last week. I may have been able
22 to give you greater relief by last week, if you had raised it.
23 It wasn't until this morning that you decided you wanted to do
24 something about it. That's why we haven't addressed this issue
25 for a week.

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1 MR. GOTTLIEB: Your Honor, okay. We were in touch
2 with RDC a few days ago and we put this in order. And the
3 truth is, your Honor, again, only because they changed, they
4 cut off two witnesses, that suddenly there is a time crunch.

5 THE COURT: But Mr. Gottlieb, I don't care about the
6 time crunch. That's not my issue. And I'm not faulting you
7 about the time. But I can't let you stand up here and say you
8 were sandbagged this morning because it just dawned on you that
9 this was something that you thought was important.

10 You can't tell me that you found out today, you can't
11 tell me you found out yesterday, you can't tell me even that
12 you found out the day before yesterday. You found this out
13 last week.

14 MR. GOTTLIEB: As far as I have said from the
15 beginning, we intend to introduce it simply as a business
16 record. We have asked RDC to provide the standard
17 certification that your Honor has seen a million times.

18 THE COURT: Why are you arguing with me? What I have
19 done? Did I hurt your feelings? What have I done to you? You
20 are arguing with me. All I said to you is exactly what you
21 asked for. If you can lay the proper foundation, it's going to
22 come in. That's the rule I say any time anybody offers a
23 document. If you can't lay the proper foundation, it probably
24 won't come in unless they agree, and it doesn't sound like they
25 want to agree and I can't force them to agree. That's all I'm

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1 saying to you.

2 When you're ready, you come to me for some relief.
3 Then let me know and I will try to give you whatever relief is
4 appropriate. But at this point there is no issue before me. I
5 can't tell you how to proceed. You have to decide how you want
6 to proceed and what assistance you want.

7 MR. GOTTLIEB: I'm only responding to the threat they
8 are going to call a rebuttal witness.

9 THE COURT: Why are you letting him upset you, then
10 you're arguing with me.

11 MR. GOTTLIEB: Mr. Roos, I'll deal with you.

12 THE COURT: Go out in the hall, then can come back and
13 you'll feel better.

14 (Recess)

15 THE COURT: Are we ready to continue?

16 MS. ROTHMAN: We are.

17 THE COURT: You want to wait for Mr. Burnett?

18 MS. ROTHMAN: No, we can proceed without Mr. Burnett.

19 THE COURT: Let's go get the jury.

20 (Jury present)

21 MS. ROTHMAN: Should we get the witness?

22 THE COURT: Will you call the next witness, please.

23 MS. ROTHMAN: The government calls Michael Paulsen.

24 THE COURT: You can be seated.

25 MICHAEL PAULSEN,

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Paulsen - Direct

1 called as a witness by the Government,
2 having been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MS. ROTHMAN:

5 Q. You can remove your mask, Mr. Paulsen.

6 A. Okay.

7 Q. Mr. Paulsen, are you familiar with a pharmacy named Regal
8 Remedies?

9 A. Yes, that was my pharmacy.

10 Q. When did you work there?

11 A. I worked there from 2016 through 2019, about
12 three-and-a-half years.

13 Q. What was your job there?

14 A. I just owned the pharmacy.

15 Q. Where was Regal Remedies located?

16 A. It was located on the corner of Olympia Boulevard off Sand
17 Lane in Staten Island, New York.

18 Q. Did you sell controlled substances at Regal Remedies?

19 A. Yes, I did.

20 Q. What types of controlled substances did you sell?

21 A. Oxycodone, Percocet and fentanyl.

22 Q. Did you sell other products at Regal Remedies?

23 A. Yes, I did. We had a full line small store. We sold
24 over-the-counter goods such as baby aspirin, deodorant,
25 diapers, waters, soda; that type of stuff, too.

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Paulsen - Direct

1 Q. Who supplied you with controlled substances?

2 A. Rochester Drug company.

3 Q. Between 2016 and 2017, did you have any other supplier of
4 controlled substances, other than Rochester Drug?

5 A. No, I did not.

6 Q. Would you purchase other items from Rochester Drug
7 Co-Operative aside from controlled substances?

8 A. Yes, I would order my heart medications, my blood pressure
9 for the store. Every single item, over-the-counter and regular
10 and prescription.

11 Q. Was it helpful to get all of your items from one
12 distributor?

13 A. Yes, it was.

14 Q. Mr. Paulsen, did you commit crimes at Regal Remedies?

15 A. Yes, I did.

16 Q. What crimes did you commit?

17 A. I basically diverted oxycodone and other pills, conspiracy.

18 Q. When did you stop working at Regal Remedies?

19 A. Unfortunately, when I got arrested in September of 2019.

20 Q. What were you arrested for?

21 A. I was arrested for -- selling narcotics and diverting pills
22 to patients.

23 Q. Have you pled guilty to those crimes?

24 A. Yes, I have.

25 Q. Have you been sentenced for your crimes?

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Paulsen - Direct

1 A. Yes, I have.

2 Q. When will you begin serving your sentence for those crimes?

3 A. I will be serving it starting this Friday, the 28th.

4 Q. Are you testifying here pursuant to an agreement with the
5 government?

6 A. Yes, I am.

7 MS. ROTHMAN: Will you please pull up for the witness
8 what's been marked for identification as 3528-544.

9 Q. Mr. Paulsen, do you recognize this document?

10 A. Yes, I do.

11 Q. What is it?

12 A. It is a document from the government that was sent over to
13 my lawyer, basically a Rule 35 agreement.

14 MS. ROTHMAN: Your Honor, at this time the government
15 offers into evidence 3528-544.

16 THE COURT: Any objection?

17 MR. JANEY: No objection. But if we could have an
18 exhibit number that would be helpful instead of the 3500.

19 MS. ROTHMAN: Sure. We can call it Government Exhibit
20 1220.

21 MR. JANEY: Thank you.

22 (Government's Exhibit 1220 received in evidence)

23 MS. ROTHMAN: May we publish to the jury?

24 THE COURT: Yes.

25 MS. ROTHMAN: Thank you, your Honor.

M1q3dou5

Paulsen - Direct

1 Q. If we can just flip through to the last page. Do you see
2 your signature on this document, Mr. Paulsen?

3 A. Yes, I do.

4 Q. Do you have any other agreements with the government, other
5 than this document?

6 A. No, I do not.

7 Q. I am going to come back to the terms of this agreement at
8 the end of your testimony.

9 I want to focus on the crimes you committed at Regal
10 Remedies. When did you open the pharmacy?

11 A. I opened the pharmacy in February of '16 with a soft
12 opening, and I mainly opened by March of '16.

13 THE COURT: Just a minute. Please continue.

14 MS. ROTHMAN: Thank you, your Honor.

15 Q. You testified that your supplier was Rochester Drug
16 Co-Operative. How did you hear about them?

17 A. I looked up the company online.

18 Q. What did you do after you found them online?

19 A. I contacted them, and tried to open up an account in
20 November of '15.

21 Q. Why did you pick Rochester Drug Co-Operative to be your
22 supplier?

23 A. Because when I contacted them, they said the monthly
24 minimum would be 50,000 a month, but they would start me at
25 30,000. And a lot of other drug companies were 75 to 100,000

M1q3dou5

Paulsen - Direct

1 minimum ordering, so they were a lot lower of a threshold for
2 me to order.

3 Q. What was the process like for signing up with Rochester
4 Drug Co-Operative?

5 A. When I first signed up, I had to fill out a regular credit
6 application, my name, my address, standard form. And then I
7 had to fill out another thing with a credit app with how much
8 money I had in the bank account at the time, checking account,
9 savings. And then they opened up my credit line about three to
10 four weeks later of \$30,000 a month to order.

11 Q. What was the process like to be able to purchase controlled
12 substances from RDC?

13 A. I had filled out a credit application, I believe it was on
14 February 15 of 2016. Jessica Pompeo had sent me an
15 application. It was like 25 or 30 questions, yes or no. Have
16 you ever owned a pharmacy before and this and that. It was a
17 pretty standard agreement. And then she opened me up 24 hours
18 later I had access to controlled substances.

19 Q. What types of controlled substances did you purchase from
20 RDC?

21 A. Mainly, oxycodone, Percocet and fentanyl, sometimes some
22 Xanax and Klonopin. But those were my main ones.

23 Q. When you opened Regal Remedies, did you intend to divert
24 controlled substances?

25 A. No, I did not.

M1q3dou5

Paulsen - Direct

1 Q. Did you divert controlled substances there?

2 A. Yes, I did.

3 Q. What happened?

4 A. Well, basically, when I opened up the store, I had a lot of
5 customers come from this doctor, David Suarez, and he sent over
6 a lot of patients with oxycodone and Percocet prescriptions
7 plus about four or five other scripts. I was getting a lot of
8 people in there between 12 and 4 in the afternoon. And, you
9 know, it was slow in the beginning, I had to pay myself and the
10 pharmacist, although it was no excuse to do what I had done.
11 And they were filling all the prescriptions walking in with a
12 lot of cash, and I saw it was easy to divert the pills. And I
13 had one patient tell me how he was selling them, and then I
14 just started going down the road of unfortunately selling these
15 pills.

16 Q. Did you keep filling prescriptions written by Dr. Suarez?

17 A. Yes, I did.

18 Q. Did you fill prescriptions for other doctors like
19 Dr. Suarez?

20 A. Yes, I did.

21 Q. What are some names that you remember?

22 A. I filled for Dr. Carl Anderson, Dr. Nkanga Nkanga,
23 Dr. David Taylor, and also Dr. Howard Adelglass.

24 Q. The second to last doctor you mentioned, I think Nkanga
25 Nkanga, how do you spell his last name?

M1q3dou5

Paulsen - Direct

1 A. The same as the first. It's N-K-A-N-G-A I believe.

2 Q. Now, those doctors that you just mentioned, Carl Anderson,
3 Dr. Suarez, Nkanga Nkanga, what percentage of the controlled
4 substances that you were filling were prescriptions coming from
5 those doctors?

6 A. I would say, if I was estimating, about 70 to 75 percent
7 from those doctors.

8 Q. What happened to those doctors?

9 A. Most of them had gotten arrested or lost their licenses or
10 both.

11 Q. Now, you spoke a bit about the patients who were coming to
12 fill prescriptions at your pharmacy. I want to go into more
13 detail about what it looked like.

14 So how many patients would come at a time with
15 prescriptions?

16 A. I would have an average of about 20, maybe 25.

17 Q. Can you describe their appearance.

18 A. Yes. A lot of them were young, between the ages of maybe
19 25 and 40. They would come in, like, well dressed with nice
20 jewelry on, a lot of cash in their pockets to pay for their
21 prescriptions basically. Most of them looked young and
22 healthy, except for like two or three that looked like they
23 were on controlled substances or had an addiction problem. But
24 most of them were healthy.

25 Q. What types of prescriptions were they bringing to Regal

M1q3dou5

Paulsen - Direct

1 Remedies to be filled?

2 A. Oxycodone and fentanyl patches.

3 Q. How would they pay for their prescriptions?

4 A. Most of them would pay cash.

5 Q. Were there any combinations of prescriptions that you
6 recall filling at your pharmacy?

7 A. Yes. There was like two types. Most of them would fill
8 oxycodone 30, and alprazolam 2 milligram which was Xanax, and
9 some of them would fill oxycodone with fentanyl patches.

10 Q. Were there any common pill counts for the prescriptions you
11 would fill at Regal Remedies?

12 A. Yes, most them were 180 pill count of the oxycodone 30.

13 Q. Did you know what the patients were doing with the pills
14 that you sold them?

15 A. Yes, I did.

16 Q. What were they doing?

17 A. They were selling and diverting pills.

18 Q. Now, did you also sell pills to patients without
19 prescriptions?

20 A. Yes, unfortunately I did.

21 Q. What would you do?

22 A. They would basically come in and fill a prescription. And
23 they would have a friend of them in there in the store, and
24 they would say, Mike, you know, do you have some extra pills
25 that I could possibly buy. And I would take 100 pills that I

M1q3dou5

Paulsen - Direct

1 would get an extra bottle from Rochester Drug and pour it into
2 the vial and sell it to the person.

3 Q. Did you have a pharmacist at Regal Remedies?

4 A. I did.

5 Q. What was his name?

6 A. Robert Pilchick.

7 Q. What did he do all day?

8 A. He basically slept most of the day.

9 Q. So who filled the prescriptions at Regal Remedies?

10 A. I did.

11 Q. Are you a licensed pharmacist?

12 A. No, I'm not.

13 Q. Can you please pull up for the witness what's been marked
14 for identification as Government Exhibit 633.

15 Do you recognize this photograph?

16 A. I do.

17 Q. Mr. Paulsen, what is it a photograph of?

18 A. It is a picture of my pharmacist sleeping in the afternoon
19 in the store.

20 MR. JANEY: Objection, your Honor.

21 THE COURT: Overruled.

22 MS. ROTHMAN: The government offers into evidence
23 Government Exhibit 633.

24 THE COURT: It will be admitted in evidence over
25 objection.

M1q3dou5

Paulsen - Direct

1 (Government's Exhibit 633 received in evidence)

2 MS. ROTHMAN: May we publish?

3 THE COURT: Yes.

4 MS. ROTHMAN: Thank you.

5 Q. Mr. Paulsen, can you describe what we are looking at in
6 this photograph?

7 A. Yes. You are looking at a picture of my pharmacist
8 sleeping in the chair, and I can see some sunlight in the
9 picture, so I am assuming it is the middle of the afternoon at
10 some point.

11 Q. What do you see on the right side of the photograph?

12 A. On the right side of the photograph, I see him sleeping in
13 a chair and a picture of my display with some medications on
14 it.

15 Q. Where in the pharmacy is this photograph taken?

16 A. It's in the back, in the pharmacy fill section department.

17 Q. So like not a back room, but where prescriptions are being
18 filled?

19 A. Correct. There was no back room. There was just a little
20 separate door with an entrance to close where we would fill the
21 prescriptions.

22 Q. Thank you. We can take that down.

23 Now, were you asked to provide dispensing data to RDC
24 in 2016?

25 A. Yes, I was.

M1q3dou5

Paulsen - Direct

1 Q. How many times did you give RDC dispensing data for Regal
2 Remedies?

3 A. Three times in the course of the 10 months I was there.

4 Q. Do you remember when you gave them dispensing data?

5 A. Yes, I sent them one on June 30, another one on
6 November 1st, I believe, and the other one in late December of
7 '16.

8 Q. After you sent them dispensing data in June 2016, did you
9 hear from RDC?

10 A. No, I did not.

11 Q. Were you diverting controlled substances at that time?

12 A. Yes, I was.

13 Q. Were you filling prescriptions for doctors like Dr. Suarez
14 and Carl Anderson?

15 A. Yes, I was.

16 Q. I want to move forward to November 2016.

17 MS. ROTHMAN: If we can pull up for the witness what's
18 in evidence as Government Exhibit 103A, please.

19 Q. Let's focus on the bottom e-mail first.

20 A. Okay.

21 Q. Do you see where it says "from"?

22 A. I do.

23 Q. Do you recognize that e-mail address?

24 A. I do, that is my e-mail address I've had,
25 MikeyBKSTS@AOL.com, yes.

M1q3dou5

Paulsen - Direct

1 Q. Who did you send this e-mail to?

2 A. I sent it to the compliance department at RDC Drug.

3 Q. What's the date your e-mail?

4 A. November 18 at 2:15 p.m.

5 Q. November 17?

6 A. I'm sorry, November 17, 2016.

7 Q. In it you write, can you read the body of your e-mail,
8 Mr. Paulsen?

9 A. Yes, I wrote: Please see attached controlled substance
10 dispensing report.

11 Q. Is this the dispensing data you sent to RDC in
12 November 2016?

13 A. That would be it, yes.

14 Q. Let's goes to the top e-mail which is in evidence. I am
15 going to read this Mr. Paulsen.

16 A. Sure.

17 Q. "Regal Remedies RX on Staten Island, NY, reviewed this
18 pharmacy's dispensing report. I'm not thrilled with this.
19 21 percent cash, they fill high oxy counts 180, 240 DU for cash
20 written by a number of questionable docs, including Martin
21 Tesher, David Taylor, Anthony Pietropinto, Joseph Olivieri,
22 Raja Bhatia. Plus it's Staten Island, need I say more. Take a
23 look of the pics from K-drive. Really? Why are we even
24 opening accounts in SI?"

25 Now, Mr. Paulsen, did you hear from RDC in November of

M1q3dou5

Paulsen - Direct

1 2016?

2 A. I did not.

3 Q. Let's look at the attachments to this e-mail. If we can
4 turn to Government Exhibit 103A.2, please.

5 Do you recognize this photograph?

6 A. Yes, I do.

7 Q. What's it a photograph of?

8 A. It's a picture of my pharmacy.

9 Q. Is that a photograph of your pharmacy that you sent to
10 Rochester Drug Co-Operative?

11 A. Yes, it is.

12 Q. Thank you. We can go to Government Exhibit 103A.3, please.

13 Do you recognize this photograph?

14 A. Yes, I do.

15 Q. What is it a photograph of?

16 A. It is a picture of the inside of the store.

17 Q. Is it a photograph -- it appears to be empty; is that
18 right, Mr. Paulsen?

19 A. Correct. That's before we got merchandising and shelves
20 when I first got the store.

21 Q. Is this a photograph that you sent to RDC?

22 A. Yes, it is.

23 Q. Thank you. We can take this down.

24 Let's pull up your dispensing data from November 2016.
25 Let's pull up Government Exhibit 103A.1, please.

M1q3dou5

Paulsen - Direct

1 Do you see Regal Remedies on the top of the Excel in
2 row 1, Mr. Paulsen?

3 A. I do, yes.

4 Q. I want to look at column H to start. If we can expand that
5 column. Thank you.

6 So looking down column H, do you see any doctors who
7 you filled prescriptions for who you believed were writing
8 medically unnecessary prescriptions?

9 A. Yes, I do.

10 Q. Can you list some of their names.

11 A. Yes. Dr. Nkanga Nkanga, Dr. David Taylor, Dr. Carl
12 Anderson, and Dr. David Suarez.

13 Q. If we can scroll down. Thank you.

14 A. And also now as you scroll down, Dr. Joseph Olivieri and
15 Dr. Martin Teshner.

16 Q. We can keep scrolling.

17 A. And Dr. Anthony Pietropinto.

18 Q. We can keep scrolling. You can keep scrolling. You can
19 scroll to the bottom of the Excel just slowly just to see the
20 different names.

21 A. Then you have Dr. Bhatia Anurag.

22 Q. Let's look at the different prescriptions you were filling.
23 If we can go to column E, please.

24 Can you read some of the different prescriptions that
25 you see in column E, Mr. Paulsen?

M1q3dou5

Paulsen - Direct

1 A. Yes. I see fentanyl 100 micrograms, oxycodone 30,
2 oxymorphone ER 40, Suboxone, Lyrica 300 milligram, then
3 fentanyl 75, and morphine sulfate.

4 Q. Let's scroll down to show the different types of controlled
5 substances, the oxycodone and others. Now, if we can go back
6 up to the top of the Excel. Focus on the method of payment
7 going over to the right side of the Excel. And where it says R
8 for plan.

9 What do the Cs in that R refer to, Mr. Paulsen?

10 A. The Cs are patients that paid cash.

11 Q. If we can scroll down. I think we get the idea. We can
12 take down this exhibit. Thank you.

13 Did you hear from RDC in November 2016 after you
14 submitted that dispensing report?

15 A. No, I did not.

16 Q. Did you keep diverting controlled substances?

17 A. Yes, I did.

18 Q. I think you said that you also provided dispensing in
19 December 2016. Do you remember that?

20 A. Yes, that is correct.

21 Q. Do you remember what happened in December 2016 when you
22 provided dispensing?

23 A. Yes, I had sent RDC a dispensing report in late December,
24 probably a day or two after Christmas I believe. And I told
25 them I needed a little more oxycodone to hold us over for the

M1q3dou5

Paulsen - Direct

1 end of the month, because I had a couple more patients coming
2 in with pain meds from their doctors. So I sent them an e-mail
3 of my dispensing report. And they e-mailed me back either late
4 that night or first thing in the morning and opened me up for a
5 few more bottles to hold me over until January 1.

6 Q. Mr. Paulsen, to be clear, the patients that were coming in
7 were patients looking to purchase controlled substances to
8 divert them; is that right?

9 A. Correct.

10 Q. Can we pull up what's in evidence as Government Exhibit
11 103C, please. If we can zoom in on the bottom e-mail.

12 Do you see Regal Remedies on that e-mail, Mr. Paulsen?

13 A. Yes, I do.

14 Q. Do you see the date?

15 A. I do.

16 Q. What's the date?

17 A. It was sent Tuesday, December 27, 2016, at 2:43 p.m.

18 Q. If we can zoom out and focus on the top e-mail. I will
19 just read this, Mr. Paulsen.

20 "Jessica, I was looking at your note from last month
21 about Regal Remedies OxyContin. It says not to release anymore
22 ordered over 5,000 until further notice. They're at 5300 now.
23 I looked at their recent dispensing he just sent for 11/17 to
24 12/27. He was better off with his previous dispensing. Their
25 cash for September to November was 25 percent for oxy. Oy. I

M1q3dou5

Paulsen - Direct

1 just looked again at the cash just on oxy on what he just sent.
2 It's at 32 percent cash. What are your thoughts. Amy."

3 Mr. Paulsen, in December 2016, did RDC stop supplying
4 with you controlled substances?

5 A. No, they did not. They just, when I called them that night
6 when I was off, they turned me on by the next morning,
7 basically just upping the thing. But they did not turn me off.

8 Q. They kept providing with you controlled substances?

9 A. Correct.

10 Q. We can take that down.

11 Mr. Paulsen, when did you first hear from RDC about
12 issues with your dispensing data?

13 A. When I first heard from them was middle of May of 2017.

14 Q. And the types of issues in your dispensing data, like
15 doctors and cash, were those the same issues in 2016 that
16 appeared in 2017?

17 A. Yes, they were.

18 Q. Tell us what happened in the summer of 2017.

19 A. In the summer of 2017, RDC had called me and said we were
20 filling too many cash patients and too much oxycodone for high
21 limits for a lot of the doctors, so they said they were going
22 to lower my limit.

23 Q. What happened after that?

24 A. After that, in May of '17, they sent down a company called
25 the Bell Buskey Group, I believe, that they had hired a

M1q3dou5

Paulsen - Direct

1 company, an outside source to check on my store. And that had
2 happened in September of 2017.

3 Q. Who came to your store in September of 2017?

4 A. I had two gentlemen come in from a company they had hired
5 from the Bell Buskey Group. They had spoke to me to overlook
6 all my controlled substances, take a look at all the store's
7 paperwork, all the prescriptions we were filling for the
8 doctors. And they just made me sign a form and said we'll have
9 RDC contact you within a couple of days to a week.

10 I was turned off for controls for about seven to maybe
11 10 business days tops, and then they re-turned me on.

12 Q. Let's pull up what's in evidence as Government Exhibit
13 103D, please. If we can zoom in on the top half of the e-mail.
14 And the date is September 5, 2017. And focusing on the
15 sentence that begins "BBG will be sent into pharmacy ASAP to
16 conduct an onsite review. The pharmacy's orders will be on
17 hold until the onsite review is completed."

18 If we can go to the attachment to 103D which I believe
19 is 103D.1, please. Let's turn to the second page and zoom in
20 on the bottom paragraph, thank you.

21 "A suspicious order activity. RDC obtained dispensing
22 reports from the pharmacy Regal Remedies RX Inc. which reflect
23 the pharmacy's dispensing activity from May 15, 2017, through
24 August 15, 2017. The following red flag activity was noted for
25 the period reported: Pharmacy accepted cash payments for

M1q3dou5

Paulsen - Direct

1 44 percent of all controlled substance transactions. Pharmacy
2 accepted cash payment for 51 percent of oxycodone transactions,
3 53 percent of oxy 30 milligram transactions, 63 percent of
4 methadone transactions, 43 percent of morphine transactions,
5 63 percent of fentanyl transactions, and 91 percent of
6 alprazolam transactions. Pharmacy filled prescriptions for 210
7 dosage units of oxy 30 milligrams written by Dr. Martin Teshar,
8 after Teshar was arrested by DEA in June of 2017."

9 Mr. Paulsen, were you filling for Dr. Teshar in 2016?

10 A. I do remember vaguely filling for him a little bit, yes.

11 Q. "Pharmacy regularly filled cash prescriptions for the
12 following prescribers: Anthony Pietropinto, David Suarez,
13 Joseph Olivieri, David Taylor, Mohammed Hashmi, Kathryn Moran,
14 Nkanga Nkanga, Gideon Hedrych, and Carl Anderson."

15 And Mr. Paulsen, were you filling for Dr. Suarez in
16 2016?

17 A. Yes, I was.

18 Q. Were you filling for Carl Anderson in 2016?

19 A. Yes.

20 Q. David Taylor?

21 A. Yes.

22 Q. Anthony Pietropinto?

23 A. Yes.

24 Q. Thank you. We can take that down.

25 Now, Mr. Paulsen, in 2017, did you start to lie to RDC

M1q3dou5

Paulsen - Direct

1 on your dispensing data?

2 A. Yes, I did.

3 Q. What did you do?

4 A. When I would send them over a controlled substance report,
5 I would basically change the numbers in there to get more
6 oxycodone, so when they would send me a report to send them a
7 data dispensing report from my pharmacy, I would change the
8 numbers.

9 Q. Did there come a time when RDC stopped selling you
10 controlled substances?

11 A. Yes, there was.

12 Q. When was that?

13 A. They had fully turned me off around May of 2019.

14 Q. When were you arrested?

15 A. In September of 2019.

16 Q. I want to move forward and talk about how you got here,
17 Mr. Paulsen.

18 After you were arrested in September 2019, did you
19 meet with federal prosecutors in connection with your case?

20 A. Yes, I did.

21 Q. In general terms, what did you talk about in those
22 meetings?

23 A. I spoke about how I diverted oxycodone and what people I
24 dealt with and how I dealt with my illegal operation I had
25 done.

M1q3dou5

Paulsen - Direct

1 Q. Did you mention RDC in those meetings?

2 A. Yes, I did.

3 Q. Did you later plead guilty to your crimes?

4 A. Yes, I did.

5 Q. Have you been sentenced for your crimes?

6 A. Yes.

7 Q. In this very courthouse, Mr. Paulsen?

8 A. Yes, correct.

9 Q. What were you sentenced to?

10 A. I was sentenced to 78 months' incarceration.

11 Q. If we can pull up your Rule 35 agreement which had been
12 marked as 3528-544 and is now Government Exhibit 1220.

13 I want to talk about this agreement. Mr. Paulsen,
14 after you were sentenced in November 2021, did you meet with
15 prosecutors again?

16 A. Yes, I did.

17 Q. Was that in connection with your testimony here?

18 A. Yes.

19 Q. If you know, how did that meeting get set up?

20 A. The government had contacted my attorney in early November,
21 and my attorney called me that the government wanted me to come
22 in and speak to them to see if they can possibly use me on this
23 case, because I dealt with Rochester Drug as my main source for
24 my pharmacy.

25 Q. How many meetings did you have with prosecutors in

Mlq3dou5

Paulsen - Direct

1 connection with your testimony here today?

2 A. About four or five.

3 Q. After those meetings, did you enter into an agreement with
4 the government?

5 A. Yes, I did.

6 Q. Under the terms of that agreement, which is on the screen,
7 what are you required to do?

8 A. Just required to tell the truth, the whole truth, and
9 nothing but the truth.

10 Q. Are you required to testify?

11 A. Yes.

12 Q. Can you commit any other crimes?

13 A. No.

14 Q. If you do those things, Mr. Paulsen, what has the
15 government promised you?

16 A. They had promised me a Rule 35(b) letter.

17 Q. What does that Rule 35 letter allow the Court to do?

18 A. It allows the Court to overlook the charges, and possibly
19 resentence me.

20 Q. With that letter, you could get resentenced in your
21 underlying case; is that correct?

22 A. Yes, that's correct.

23 Q. Who gets that letter?

24 A. A copy goes to my attorney and a copy to Judge Crotty.

25 Q. If the government writes that letter, is the judge required

M1q3dou5

Paulsen - Direct

1 to resentence you?

2 A. No, he is not.

3 Q. Could the judge give you the exact same sentence you
4 already have?

5 A. Yes, he can.

6 Q. Has anyone promised you a different sentence?

7 A. No, they have not.

8 Q. Sitting here today, do you know what will happen with your
9 sentence?

10 A. No, I do not.

11 Q. If you lie today on the witness stand, will you get that
12 letter from the government?

13 A. No, I will not.

14 Q. Now, Mr. Paulsen, in connection with your testimony, did
15 the government ask the Court to delay your surrender date to
16 prison?

17 A. Yes, they did.

18 Q. Why did they do that?

19 A. The main reason was because the COVID, with the omicron
20 being very bad, it is hard to get someone in and out of a
21 federal prison right now without quarantining and getting into
22 the courthouse.

23 Q. Does the verdict in this case affect whether or not you get
24 resentenced?

25 A. No.

M1q3dou5

Paulsen - Direct

1 Q. Regardless of your testimony and the outcome in this case,
2 where are you going on Friday, Mr. Paulsen?

3 A. I'm self-surrendering to Fort Dix federal prison on Friday.

4 MS. ROTHMAN: Your Honor, I have no further questions.

5 (Continued on next page)

M1QBDOU6

Paulsen - Cross

1 THE COURT: Cross examination.

2 MR. JANEY: Thank you, your Honor.

3 CROSS-EXAMINATION

4 BY MR. JANEY:

5 Q. Mr. Paulsen, I want to be sure that we understand your
6 testimony today. You were asked about several doctors
7 including a Dr. Suarez. Do you recall that?

8 A. Yes.

9 Q. And it's certainly not Dr. Suarez's fault that you sold
10 illicit drugs at Regal's pharmacies, correct?

11 A. Correct.

12 Q. And nobody made you forge signatures on the prescriptions
13 where you forged signatures; is that correct?

14 A. That's correct.

15 Q. You falsified the signature of your pharmacist day in and
16 day out, correct?

17 A. Yes.

18 Q. And you've never met Larry Doud, correct?

19 A. That's correct.

20 Q. Never spoke with Larry Doud, correct?

21 A. That's correct.

22 Q. And before today, you wouldn't be able to pick out Larry
23 Doud in a room full of people, correct?

24 A. No, because I've seen his picture. I know who he is.

25 Q. But aside from seeing his picture, you've had no personal

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Paulsen - Cross

1 contact with him?

2 A. No.

3 Q. Never sent him an email?

4 A. No.

5 Q. Never gotten an email from him?

6 A. No.

7 Q. He never called you on the phone?

8 A. No.

9 Q. You were asked in your direct testimony about the crimes
10 that you committed, correct?

11 A. Yes.

12 Q. And you said on the witness stand today that there was no
13 excuse for those crimes, correct?

14 A. Correct.

15 Q. When you were sentenced by Judge Crotty, you had no
16 explanation as to why you committed the crimes you did,
17 correct?

18 A. That's incorrect. I told them why I did it.

19 Q. Well, let's think about it. Well, you were sentenced by
20 Judge Crotty as the government says in this courthouse on
21 September 9, 2021, correct?

22 A. Yes, that's correct.

23 Q. And at the time the Court asked you, you knew all the time
24 the dangers of oxycodone, didn't you?

25 A. Yes, I did.

M1QBDOU6

Paulsen - Cross

1 Q. And you said, I did, your Honor, yes, correct?

2 A. Yes, I did.

3 Q. And the Court said to you, in fact, your sister had some
4 difficulty with drugs, correct; isn't that what the Court said?

5 A. Yes.

6 Q. And you said, yes, she did have a drug problem, correct?

7 A. Yes.

8 Q. And the Court said to you, so you had a firsthand knowledge
9 within your family and you said yes, correct?

10 A. Yes.

11 MS. ROTHMAN: Objection, hearsay.

12 THE COURT: Overruled. You can answer.

13 Q. And then the Court said to you, and you continued dealing
14 with the drugs selling the oxycodone, correct?

15 A. Yes.

16 Q. You said yes. And the Court asked you what other
17 explanation is there than you are doing it for the money,
18 correct, isn't that what Judge Crotty said?

19 A. Yes.

20 Q. And you went on in your response to Judge Crotty to say, I
21 don't know, I just went down that path. I don't know why.
22 Isn't that what you said?

23 A. Yes.

24 Q. Do you still not know why, Mr. Paulsen?

25 A. Well, I basically told them -- I mean in one sense, I knew

M1QBDOU6

Paulsen - Cross

1 why I was greedy. I wanted to make money. It was a terrible
2 thing I did.

3 Q. And no one made you do it, did they?

4 A. No.

5 Q. Shortly after you were arrested, you tried to provide
6 information to government prosecutors in your case captioned as
7 *United States of America v. Michael Paulsen*, correct?

8 A. Yes.

9 Q. Cooperation information, to coin a phrase, correct?

10 A. Correct.

11 Q. You pleaded guilty to one count of narcotics conspiracy in
12 March 2021, correct?

13 A. Correct.

14 Q. And when you pleaded guilty, you tried to offer your
15 cooperation assistance to the government prosecutors in your
16 case even then, didn't you, Mr. Paulsen?

17 A. That is correct.

18 Q. In fact, you met twice with the prosecutors in your case
19 after your arrest, correct?

20 A. That is correct.

21 Q. In an effort to provide cooperation information, correct?

22 A. That is correct.

23 Q. Is it fair to say that the purpose of providing this
24 information or your intent was to reduce the potential sentence
25 you might ultimately receive, correct?

M1QBDOU6

Paulsen - Cross

1 A. Yes.

2 Q. At those times, the times of your case when you were trying
3 to provide cooperation information, even then, isn't it
4 correct, to say that the government prosecutors in your case
5 did not believe the information to be especially helpful?

6 MS. ROTHMAN: Objection.

7 THE COURT: Sustained as to the form of the question.

8 A. They didn't tell me --

9 THE COURT: Just a second. You don't have to answer
10 that question. Restate the question.

11 Q. Certainly at no time between when you were arrested in
12 September of 2019 and when you were sentenced in September of
13 2021 did the U.S. Attorney's office provide you with a
14 cooperation agreement, did they?

15 A. No, they did not.

16 Q. Isn't it fair to say that you believe that cooperation
17 agreement might have benefited you by being a potential factor
18 for a lower sentence in your case?

19 A. Yes.

20 Q. But by sentencing, still no cooperation agreement, correct?

21 A. Correct.

22 Q. And as the government pointed out and elicited from you
23 here today on your direct, you were sentenced to a term of
24 imprisonment of 78 months, six and a half years, correct?

25 A. That is correct.

M1QBDOU6

Paulsen - Cross

1 Q. And it is fair to say, Mr. Paulsen, that six and a half
2 years is a long time, isn't it?

3 A. Yes, it is.

4 Q. Again, you don't actually know Larry Doud, do you,
5 Mr. Paulsen?

6 A. No, I do not.

7 Q. Never spoke with him, have you?

8 A. No.

9 Q. But in October of 2021, you were contacted by government
10 prosecutors in this case against Laurence Doud about providing
11 information about Laurence Doud, the defendant in this case,
12 correct?

13 A. Yes, that is correct.

14 Q. In November of 2021, you first met with prosecutors in this
15 case against Mr. Doud, didn't you, Mr. Paulsen?

16 A. Yes.

17 Q. And as you testified, you were originally scheduled to
18 surrender and to begin that six and a half year sentence on
19 January 21, weren't you, Mr. Paulsen?

20 A. Yes, that is correct.

21 Q. On January 14, just a few days before the start of this
22 trial, you signed a cooperation agreement with the U.S.
23 Attorney's Office for information you might provide in this
24 case against Mr. Doud, correct?

25 MS. ROTHMAN: Objection the Rule 35 letter.

M1QBDOU6

Paulsen - Cross

1 THE COURT: Why don't you restate the question. I
2 think you misstated it.

3 Q. On January 14, just a few days before the start of this
4 trial, you signed a Rule 35 letter with the U.S. Attorney's
5 Office for information you might provide in this case against
6 Laurence Doud, correct?

7 A. Yes.

8 Q. And again prior to today, you wouldn't have been able to
9 pick him out in a room other than the photo that you've seen,
10 correct?

11 A. Yes.

12 MS. ROTHMAN: Your Honor, I will stipulate that the
13 witness does not know Mr. Doud.

14 THE COURT: Is that an objection?

15 MS. ROTHMAN: No.

16 THE COURT: Then let's move on.

17 Q. Now, in your cooperation agreement, you identified that the
18 terms of your plea was in Count One of your indictment in your
19 case, correct?

20 A. Yes.

21 Q. Conspiring to distribute and possess with intent to
22 distribute oxycodone from March 2016 through September 2019 in
23 violation of federal law, correct?

24 A. Yes.

25 Q. In fact, you funneled pills onto the street of your local

M1QBDOU6

Paulsen - Cross

1 neighborhood out the back door of your pharmacy and to addict
2 users, didn't you, Mr. Paulsen?

3 A. Yes.

4 Q. You enlisted the help of others directing certain
5 individuals to provide you with fraudulent prescriptions and
6 getting others to assist you in filling out the prescriptions
7 despite not having the necessary authority as a pharmacist,
8 didn't you, Mr. Paulsen?

9 A. Yes.

10 Q. You handed out oxycodone pills to people who would in turn
11 resell those pills so that they could generate additional cash,
12 didn't you, Mr. Paulsen?

13 A. Yes.

14 Q. You fraudulently held yourself out as a pharmacist, didn't
15 you, Mr. Paulsen?

16 A. Yes.

17 Q. Forged the name of your pharmacist at Regal Remedies to oxy
18 prescription, didn't you, Mr. Paulsen?

19 A. Yes.

20 Q. You were a street level drug dealer getting oxy to the
21 street, even if it meant lying to your distributor, didn't you,
22 Mr. Paulsen?

23 A. Well, I didn't have to lie to them the first year and a
24 half.

25 Q. That's not my question. That's not my question. You

M1QBDOU6

Paulsen - Cross

1 deceived them with false documents at RDC, didn't you,
2 Mr. Paulsen?

3 A. Yes, I did.

4 Q. You did these things even though your own sister was
5 addicted to prescription drugs and then to heroin.

6 Did you ever sell her oxy pills during that timeframe?

7 A. No, I did not.

8 Q. Not all of the pills that you purchased from RDC were for
9 an illicit purposes, were they, Mr. Paulsen?

10 A. No.

11 Q. Only some portion of them are pills you sold out the back
12 door to addicts and others, correct, Mr. Paulsen?

13 A. Correct.

14 Q. And RDC, because you falsified prescriptions and
15 manipulated dispensing data wouldn't know firsthand whether you
16 were telling the truth in those documents or not, correct?

17 MS. ROTHMAN: Objection, your Honor.

18 THE COURT: Overruled. You can answer.

19 A. That's incorrect because for part of the year I dealt with
20 the doctors that RDC knew were hot doctors.

21 Q. That's not my question, Mr. Paulsen. You submitted false
22 and manipulated documents to RDC, correct?

23 A. Correct, but not the whole time.

24 Q. Some of the time, didn't you, Mr. Paulsen?

25 A. That is correct, yes. When you question it that way, yes.

M1QBDOU6

Paulsen - Cross

1 Q. Is there a distinction with a difference?

2 MS. ROTHMAN: Objection.

3 MR. JANEY: Withdrawn. Just one moment.

4 THE COURT: Yes.

5 MR. JANEY: If we can have what's been marked as
6 Government Exhibit 103C.

7 THE COURT: In evidence?

8 MR. JANEY: Let me confirm with the government, your
9 Honor. I believe it's in evidence.

10 MS. ROTHMAN: It's in evidence.

11 THE COURT: All right. You can display it.

12 Q. If we could show it to the jury, please. If we can amplify
13 the header of the email at the top of the page.

14 Can you see that there, Mr. Paulsen?

15 A. Yes, I can.

16 Q. Is Larry Doud in this email?

17 A. I don't see his name in the email, no.

18 Q. Looking at the -- let's look at the second part of the
19 email highlighting it for the witness. Is Larry Doud's name in
20 this email, Mr. Paulsen?

21 A. No, it is not.

22 Q. You can take down. Let's look at 103D, please, Government
23 Exhibit 103D, highlighting the top of the email, please, for
24 the witness.

25 Mr. Doud's name in this email?

M1QBDOU6

Paulsen - Cross

1 A. No.

2 Q. Take this down, please. Can I see 103D.1, please. Do you
3 know what this is?

4 A. Yes, it's a suspicious order activity report.

5 Q. What is that?

6 A. It means if a store or somebody is suspicious of narcotics
7 or something else going on there with controls.

8 Q. You don't have a background in compliance, do you,
9 Mr. Paulsen?

10 A. No, I do not.

11 Q. And you don't know the process steps that it takes before a
12 suspicious order activity report is filed to the DEA, do you,
13 Mr. Paulsen?

14 A. No, I do not.

15 Q. Take it down, please. Can we see 103A.2. Now, Mr.
16 Paulsen, this is the photo of Regal Remedies that you sent to
17 RDC when you were first intending to do business with them,
18 correct?

19 A. Correct.

20 Q. And is it fair to say that it is the front of the store?

21 A. Yes, that is.

22 Q. Now, prior to starting Regal Remedies, you had actually
23 worked in a pharmacy for quite some time, correct?

24 A. Yes, I did.

25 Q. And that would be Eisenberg pharmacy, correct?

M1QBDOU6

Paulsen - Cross

1 A. Yes, I did.

2 Q. Eisenberg pharmacy is located where?

3 A. I don't believe it's there anymore.

4 Q. Where was it?

5 A. It was in Brooklyn, New York, on 86th Street.

6 Q. Can you describe the neighborhood that it was in?

7 A. It was in a residential neighborhood on a busy street on
8 the road where there's a lot of pharmacies and stores and
9 businesses, just a busy area where there's a lot of business.

10 Q. Is it fair to say it's a working class neighborhood?

11 A. Yes, that would be fair to say.

12 Q. And viewing the exhibit here on the screen, is it fair to
13 that Regal Remedies was in a working class neighborhood in
14 Staten Island?

15 A. Yes, it was.

16 Q. And is it fair to say that folks who live and work in
17 working class neighborhoods should have pharmacies in those
18 neighbors, Mr. Paulsen, in your opinion?

19 A. Yes.

20 MS. ROTHMAN: Objection.

21 THE COURT: Overruled, I'll let that answer stand.

22 MR. JANEY: No further questions, your Honor.

23 THE COURT: Any further questions.

24 MS. ROTHMAN: Just briefly, your Honor. Thank you.

25 REDIRECT EXAMINATION

M1QBD0U6

Paulsen - Redirect

1 BY MS. ROTHMAN:

2 Q. Mr. Paulsen, do you remember when Mr. Janey called you a
3 street level drug dealer?

4 A. Yes.

5 Q. Who supplied you with those drugs?

6 A. Rochester Drug Corporation.

7 Q. Do you remember when Mr. Janey asked you if you were
8 deceiving Rochester Drug Corporation with information about
9 your dispensing?

10 A. Yes, I do.

11 Q. Can we pull up what's in evidence as Government Exhibit
12 103A, please. If we can zoom in on the top half of the page.
13 This is dispensing data from you to RDC in November of 2016?

14 A. Yes, it is, November 18, 2016.

15 Q. Do you see where Julius Morton writes, 21 percent cash?

16 A. Yes, I do.

17 Q. And I am not thrilled with this?

18 A. Yes.

19 Q. And a number of questionable docs?

20 A. Yes, I do.

21 Q. And why are we even opening up the accounts in Staten
22 Island?

23 A. Yes, I see it.

24 Q. Does RDC appear to be deceived, Mr. Paulsen?

25 A. No, not to me.

M1QBDOU6

Rosenberg - Direct

1 Q. We can take this down.

2 Mr. Paulsen, did you want to cause people to become
3 addicted or suffer from controlled substances?

4 A. No, unfortunately not. I apologize for my crimes everyday
5 and it's a terrible thing I did, no.

6 Q. But you did do it?

7 A. Yes, I did.

8 MS. ROTHMAN: No further questions.

9 THE COURT: Any further questions?

10 MR. JANEY: Nothing further.

11 THE COURT: Thank you, sir. You can step down.

12 (Witness excused)

13 THE COURT: Will the government call its next witness,
14 please.

15 MR. BURNETT: The government calls Sarah Rosenberg.

16 SARAH ROSENBERG,

17 called as a witness by the government,

18 having been duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. BURNETT:

21 Q. Good afternoon, Ms. Rosenberg.

22 A. Good afternoon.

23 Q. Where do you work?

24 A. I work at the U.S. Attorney's Office for the Southern
25 District of New York.

M1QBDOU6

Rosenberg - Direct

1 Q. What's your job there?

2 A. I'm a paralegal specialist.

3 Q. How long have you worked there?

4 A. Around a year and a half.

5 Q. What are your responsibilities as a paralegal specialist?

6 A. Generally assisting the Assistant U.S. Attorneys with
7 matters of discovery, co-signors and trials.

8 Q. Now, have you reviewed exhibits in preparing for your
9 testimony today?

10 A. I have.

11 Q. Did you review summary charts in connection with this case?

12 A. I have.

13 Q. And are the charts -- and did you create or review charts
14 that other people created in connection with evidence in this
15 case?

16 A. Yes, I reviewed charts others had created.

17 Q. Are those charts based in part on exhibits that are already
18 in evidence at trial?

19 A. Yes.

20 Q. And did those exhibits consist of many pages?

21 A. Yes, they did.

22 Q. Now, to prepare for testifying today, have you met with
23 attorneys for the government?

24 A. I have.

25 Q. Have you met with me?

M1QBDOU6

Rosenberg - Direct

1 A. I have.

2 Q. What role did the attorneys for the government play in
3 identifying the materials and the charts that you're going to
4 testify about today?

5 A. They were the ones to identify all the materials I'll be
6 testifying about.

7 Q. I'd like to show you, and just for the witness, the parties
8 and the Court, what's been marked as Government Exhibit 908.
9 Do you recognize this?

10 A. I do.

11 Q. What is it?

12 A. It is a table I believe prepared by Mr. Cutler that shows
13 the dosage units for all opioids in RDC's orders per month and
14 then there are additional boxes that state specific months and
15 associated government exhibits.

16 Q. And did you review this chart to make sure that the
17 government exhibits that are listed on this chart line up with
18 government exhibits that have been entered in evidence in this
19 case?

20 A. Yes, I checked all of the government exhibits and ensured
21 the dates were in fact correct.

22 MR. BURNETT: Your Honor, at this time the government
23 offers Exhibit 908.

24 MR. GOTTLIEB: No objection, your Honor.

25 THE COURT: It will be admitted into evidence.

M1QBDOU6

Rosenberg - Direct

(Government's Exhibit 908 received in evidence)

Q. Let's publish Exhibit 908 for the jury and start with page

2. I just want to use page 2 here as an example. You see this is for Regal Remedies, Inc., in Staten Island?

A. I do.

Q. Where does the underlying data, setting aside the little box, where does the underlying data come from?

A. I believe it comes from charts Mr. Cutler prepared.

Q. I think you mentioned those charts had something to do with sales; is that right?

A. Yes, they show the amount of sales of dosage units of opioids per month.

Q. To the pharmacies listed?

A. Correct, to the pharmacies listed. It's specific to that pharmacy.

Q. Just to get our bearings, what are the little boxes with dates in them?

A. The little boxes with dates in them on the top reflect associated government exhibits in those same months.

Q. Let's take an example with respect to Regal Remedies since we've been talking about it. Let's take a look at Government Exhibit 103B. Do you see that this is an email from November 21, 2016?

A. I do.

Q. Did that line up with the date in the box on that chart?

M1QBDOU6

Rosenberg - Direct

1 A. It did.

2 Q. Who is it from?

3 A. It is from Bill Pietruszewski.

4 Q. Do you see that it's to Larry Doud and a few other people?

5 A. I do.

6 Q. What is the text of that email say?

7 A. It says, please see above last week's compliance auditors
8 report.

9 Q. Do you see there are a couple of attachments there?

10 A. I do.

11 Q. I want to take a look at one of those attachments which is
12 103B2. Do you see that there's this title, weekly activity
13 sheet?

14 A. I do.

15 Q. What's the name next to compliance auditor?

16 A. Julius Morton.

17 Q. Can you take a look at the paragraph where it's labeled
18 Friday, November 18.

19 A. Yes, I see it.

20 Q. Do you see there's a sentence that begins review Regal
21 Remedies?

22 A. Yes.

23 Q. Can you please read that sentence.

24 A. Review Regal Remedies RX dispensing report, recommended to
25 Bill P. This pharmacy be suspended from ordering CS.

M1QBDOU6

Rosenberg - Direct

1 Q. Thank you, Ms. Rosenberg. Let's take that down. Let's go
2 back to Government Exhibit 908. I want to move ahead now to
3 Bay Ridge pharmacy which is listed here on page 1 of the slide.
4 Do you see that?

5 A. I do.

6 Q. Did you do the same thing with respect to this Bay Ridge
7 chart as you did with the Regel Remedies chart?

8 A. I did.

9 Q. Obviously there are quite a few exhibits compared to the
10 last chart. We're not going to go through them all. I just
11 want to go through two of them.

12 Let's go to Government Exhibit 101F. Do you see that
13 from December of 2015 here?

14 A. I do.

15 Q. Who's this email from?

16 A. It is from Jessica Pompeo.

17 Q. And when is it from?

18 A. It is from December 14, 2015.

19 Q. You can take that blow up down. Do you see towards the end
20 of the main paragraph here, the sentence that begins with, Do
21 not like. Would you please read that sentence?

22 A. Yes. Do not like 90 percent of the prescribers and a bunch
23 of our buddies are on here with writing for 180, 240, and 360
24 plus units of oxy, 30 milligrams. I have attached dispensing
25 as well.

M1QBDOU6

Rosenberg - Direct

1 Q. If we were to go back to the chart on 908. Are you able to
2 use this chart to see whether RDC continued selling to this
3 particular pharmacy after that email?

4 A. Yes, they did.

5 Q. Let's go to the next chart which I believe is for ProHealth
6 I think Regal Remedy is the second. I apologize. Old Town
7 pharmacy. What's charted out here?

8 A. Similar to the two pharmacies we looked at prior. It is
9 amount of dosage unit for opioid sold per month from RDC to Old
10 Town pharmacy.

11 Q. And the exhibits that are listed here, are they already in
12 evidence?

13 A. That is correct.

14 Q. Let's move ahead to the next slide. What pharmacy is it
15 for?

16 A. This is for ProHealth pharmacy.

17 Q. Again, what did you do with this underlying sales data
18 chart?

19 A. I confirmed that all of the exhibits listed and the months
20 that is listed next to them are in fact correct and the dates
21 on which the exhibits come from.

22 Q. I don't think there is anyone in particular that we need to
23 cover here, so let's move ahead to the next slide. You see
24 that this is for Linden Care pharmacy?

25 A. I do.

M1QBDOU6

Rosenberg - Direct

1 Q. And again, what did you do to prep this slide?

2 A. Again, same as with the others, I reviewed all of the
3 exhibits listed and verified that the dates listed are in fact
4 the date on which they were sent if they were emails or were
5 dated otherwise.

6 Q. Now, I just want to look at three of these. Obviously
7 there are a number listed. Do you see October 2014, one of the
8 government exhibit listed in there is Government Exhibit 108K?

9 A. I do.

10 Q. Let's take a look at Government Exhibit 108K. I want to
11 start with the first email in this chain, so for the one that's
12 from Arthur Kersey. Do you see that?

13 A. I do.

14 Q. Who is it to?

15 A. Bill Pietruszewski.

16 Q. According to the signature block, what is Arthur Kersey's
17 title?

18 A. Chief compliance officer.

19 Q. Chief compliance officer of what?

20 A. Linden Care, LLC.

21 Q. What's the first sentence in his email?

22 A. Attached is the September dispensing report.

23 Q. Let's take that down. Do you see that Bill Pietruszewski
24 forwards that to Jessica Pompeo?

25 A. I do.

M1QBDOU6

Rosenberg - Direct

1 Q. How does Jessica respond?

2 A. She writes: Yah, they are filling cash prescriptions for
3 two of the doctors on the DEA watch list, Jeffrey Goldstein and
4 Todd Shilfstein, hmm.

5 Q. Let's go back to the Linden Care slide on Exhibit 908. I
6 want to skip ahead this time to Government Exhibit 108S which
7 you see in the February 2015 bubble?

8 A. I do.

9 Q. Who is this from?

10 A. From Jessica Pompeo.

11 Q. Who is it to?

12 A. Bill Pietruszewski.

13 Q. What does she write?

14 A. She writes: Here are the top prescribers so far I found
15 from Linden Care. Lots of cash on subsys, total 26 percent,
16 but lots of individual prescribers over 70 percent. Let me
17 know if you have any questions, please.

18 Q. Is it possible -- do you see there's an attachment to that?

19 A. I do.

20 Q. Is it possible to pull up that attachment. I believe only
21 to be outside of trial director. It's 108S.1. Let's scroll
22 over to the far left of the chart, please.

23 Do you see columns A entitled top CS prescriber of
24 concerns?

25 A. I do.

M1QBDOU6

Rosenberg - Direct

1 Q. Can you read the titles of the three columns after that?

2 A. Column B is trinity doc. Column C is top prescriber of
3 concern, and column D is subsys high cash.

4 Q. Just scrolling down do you see there are yeses next to
5 prescribers of concern and subsys high cash for a number of
6 these doctors?

7 A. I do.

8 Q. Thank you. Let's go back to the Linden Care slide on
9 Government Exhibit 908, and I'd like to look at just one more
10 document. I would like to look at Government Exhibit 108T
11 which is also from February 2015 according to this chart?

12 A. I see it.

13 Q. And let's start with the second email from the top. Who's
14 it from?

15 A. It is from Jessica Pompeo.

16 Q. Who is it to?

17 A. Bill Pietruszewski.

18 Q. What does Jessica write?

19 A. Jessica writes: This is a Linden Care doctor that is a
20 high prescriber of subsys. Just received yesterday the
21 discipline. It is for high prescribing of controlled
22 substances in Arkansas. He is on the list I emailed you.

23 Q. How does Bill Pietruszewski respond?

24 A. Bill writes above: This sucks. Thank you.

25 Q. Let's take this down and go back to Government Exhibit 908.

M1QBDOU6

Rosenberg - Direct

1 Let's go ahead to the next slide on the chart, slide number 6.

2 Do you see this is Seventh Elm pharmacy?

3 A. I do.

4 Q. Have you done the same thing with respect to this chart as
5 you did with the other charts?

6 A. I have.

7 Q. Let's take a look at just one exhibit here, Government
8 Exhibit 109F, which according to this chart is from July 2014,
9 correct?

10 A. Correct.

11 Q. Could you read the first four -- when is this from?

12 A. It is from July 2014.

13 Q. Who's it from?

14 A. The email at the very top is from Jessica Pompeo to Chris
15 Noulis and Bill Pietruszewski.

16 Q. Could you read the first four lines of this email.

17 A. Chris, good afternoon. This order was released yesterday
18 afternoon by myself. The information I have on file was from
19 almost a year ago though. I have personally tried --

20 Q. I apologize. Let's stop there and actually scroll down to
21 the bottom of this email.

22 Do you see this is one of the order of interest email?

23 A. I do.

24 Q. What's the drug that it's about?

25 A. OxyContin.

M1QBDOU6

Rosenberg - Direct

1 Q. What's the pharmacy that it's about?

2 A. Seventh Elm drug corp.

3 Q. Let's go back to Government Exhibit 908 now. Move ahead in
4 the next part of the chart to slide 7.

5 What are the pharmacies that are listed here?

6 A. It's Aliton's pharmacy in Port Jervis, New York, and in
7 Milford, PA.

8 Q. Do you see there are a number of red portions of the line
9 on this chart?

10 A. I do.

11 Q. I want to start from before the red portion of the line
12 show up with an email marked Government Exhibit 110A from
13 August of 2013?

14 A. I see that.

15 Q. When is this email from?

16 A. It is from August 2013.

17 Q. Who is it from?

18 A. It is from Bruce Beiber.

19 Q. Do you see that it goes to Laurence Doud and a few other
20 people, including Joe Brennan?

21 A. I do.

22 Q. What's the subject?

23 A. Braunagel and Braunagel Incorporated, d/b/a, Aliton's
24 pharmacy.

25 Q. Could you read the first paragraph of this email.

M1QBDOU6

Rosenberg - Direct

1 A. Jonathan alerted me to a potential situation involving
2 Braunagel and Braunagel. I immediately undertook some online
3 research and came across the attached article. Needless to say
4 the situation is quite troubling. Apparently sales of
5 medicines exploded from patients traveling from the city.
6 Apparently the patients were "suspicious" but Braunagel filled
7 their scripts. The article is quite troubling as it appears he
8 had a reason to be suspicious.

9 Q. Do you see that there is an attachment to this email?

10 A. I do.

11 Q. Let's go to that attachment which is 110A.1. Could you
12 read the title?

13 A. Suspicious prescriptions raise concerns at port pharmacy.

14 Q. Just the first sentence, please.

15 A. Eighteen people have been arrested in a two month period
16 for trying to fill illegitimate prescription at Aliton's
17 pharmacy at Port Jervis according to the police and the
18 pharmacy owner.

19 Q. Let's go back now to 908, and we're looking back now at the
20 Aliton's pharmacy charts just to situate ourselves. Where was
21 that email in relation to this sales chart?

22 A. It is the first bubble above August 2013.

23 Q. Let's go to, I believe, the final portion of this exhibit
24 which is Government Exhibit 8. Do you see that for Blairsville
25 pharmacy?

M1QBDOU6

Rosenberg - Direct

1 A. I do.

2 Q. What did you do with this slide?

3 A. The same as all of the others, I reviewed all of the boxes
4 with dates and government exhibits to ensure that they in fact
5 matched.

6 Q. And I just want to take a look at one of these. Can we
7 look at Government Exhibit 111D which according to this chart
8 is from October 2015?

9 A. Sure.

10 Q. Looking at the original email here, do you see it's one of
11 those control order of interest emails?

12 A. Yes, it is.

13 Q. What's the drug group?

14 A. It is a duragesic.

15 Q. Who's the customer?

16 A. Blairsville pharmacy.

17 Q. Do you see in the email above Jessica Pompeo forwards this
18 to Kevin Taraszewski?

19 A. I do.

20 Q. Could you please read the first paragraph of Jessica
21 Pompeo's email?

22 A. We still need dispensing from Brian and all required
23 compliance information. I have talked to Brian twice in the
24 last week for dispensing and will be calling him again shortly.
25 He keeps saying he will get to us, dot, dot, dot. A little

M1QBD0U6

Rosenberg - Direct

1 concerning that he has hit so many alerts with match to Brine
2 who is a larger customer.

3 Q. Thank you. Let's take that down. I believe that was the
4 last slide in Government Exhibit 908; is that correct?

5 A. That's correct.

6 Q. I want to wrap up on a different subject. Have you
7 reviewed what's in evidence as Government Exhibit 348A?

8 A. I have.

9 Q. Is it possible to pull that up on the screen briefly for
10 the jury. Could you just describe briefly what's in Government
11 Exhibit 348A?

12 A. It's my understanding that it list pharmacies and then the
13 amounts of a specific drug fentanyl that was sold and dispensed
14 to them for the years 2012, 2013, 2014, 2015, 2016, and then a
15 total summation column.

16 Q. Have you reviewed charts that were created using excerpts
17 of the data from this larger data set?

18 A. I have and I compared the excerpts to the larger data set.

19 Q. Did you find the excerpts to be an accurate comparison to
20 the larger data set?

21 A. I did.

22 Q. I'm going to show you what's been marked as Government
23 Exhibit 909. If this could just go to the witness, the Court
24 and the parties. Do you see that there are two sheets here?

25 A. I do.

M1QBDOU6

Rosenberg - Direct

1 Q. Is this the excerpt document that you just testified about?

2 A. If I could just see sheet two.

3 Q. Yes. I apologize.

4 A. Yes, it is.

5 MR. BURNETT: Your Honor, at this time the government
6 offers Exhibit 909 in evidence.

7 MR. GOTTLIEB: No objection.

8 THE COURT: It will be admitted into evidence.

9 (Government's Exhibit 909 received in evidence)

10 MR. BURNETT: Let's please publish Exhibit 909 to the
11 jury.

12 Q. We're looking now at sheet 1 of Government Exhibit 909.

13 Can you read the title?

14 A. Fentanyl sales to pharmacies in GX 908A.

15 Q. What are the pharmacies that are listed out in this chart.
16 These are the same pharmacies that were listed individually in
17 Government Exhibit 908A?

18 A. So it's SBSC, LLC; Regal Remedies RX, Old Town Pharmacy
19 Incorporated, ProHealth pharmacy, Inc., Linden Care, LLC,
20 Seventh Elm Drug Corp., Aliton's pharmacy in Milford and
21 Blairsville pharmacy.

22 Q. And are those the pharmacies charts that you testified
23 about just a few minutes ago?

24 A. Yes, they are.

25 Q. And what does this chart show about sales to those

M1QBDOU6

Rosenberg - Direct

1 pharmacies?

2 A. It list the specific amount of fentanyl sold to each
3 pharmacy per year and then a grand total.

4 Q. Let's take a look now at sheet 2 and scroll up to the top,
5 please. What the title here?

6 A. Fentanyl sales to pharmacies terminated between 2017 and
7 2020.

8 Q. Now, have you seen a chart of pharmacies that were
9 terminated after Mr. Doud left the company?

10 A. I have.

11 MR. GOTTLIEB: Your Honor, objection. May we have a
12 sidebar.

13 THE COURT: You're objecting to the question?

14 MR. GOTTLIEB: Objection to a portion of this exhibit.

15 THE COURT: All right.

16 (Continued on next page)

M1QBDOU6

Rosenberg - Direct

1 (Sidebar)

2 THE COURT: What's the objection?

3 MR. GOTTLIEB: Your Honor, I just notice on page 2 it
4 deals with sales from 2017 to 2020 which is beyond the
5 indictment. I thought we had an agreement that at the outset
6 of the trial that with regard to this information it will be
7 restricted within the time of the indictment which would be
8 2012 to the beginning of 2017.

9 MR. BURNETT: It's just a confusion with the reading
10 of the title. These were the pharmacies that were terminated
11 between 2017 and 2020, and it was the sales to those pharmacies
12 between 2012 and 2016.

13 MR. GOTTLIEB: Thank you for that correction.

14 (Continued on next page)

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Rosenberg - Cross

(In open court; jury present)

BY MR. BURNETT:

Q. Ms. Rosenberg, are the pharmacies that are listed here pharmacies that RDC terminated between 2017 and 2020, but sold fentanyl to between 2012 and 2016?

A. Correct.

Q. And the data that's in the chart, does that reflect the fentanyl sales to those pharmacies between 2012 and 2016?

A. Correct, and then a final column which displays the total of all of those years sold.

MR. BURNETT: No further questions, your Honor.

THE COURT: Any questions for this witness.

MR. GOTTLIEB: Yes, your Honor.

CROSS-EXAMINATION

BY MR. GOTTLIEB:

Q. Good afternoon, Ms. Rosenberg.

A. Good afternoon.

Q. If I could just ask you, you were given these documents to superimpose on those exhibits, correct, by the government, correct?

A. I was not the one who created these. I verified them for accuracy.

Q. With regard to this last list if we could go to 909, Government Exhibit 909?

A. I see it.

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Rosenberg - Cross

1 Q. This particular list, lists the pharmacies and sales of
2 fentanyl, correct?

3 A. Correct.

4 Q. And is it fair to say that this list, and I believe
5 Government Exhibit 348A, you're not indicating by these
6 notations that any portion of the fentanyl was actually
7 diverted, correct?

8 A. To my knowledge these numbers indicate the amount of
9 fentanyl sold from RDC to the pharmacies and that is the
10 meaning of the numbers.

11 Q. So both this Exhibit 909, and if we could look at 348A,
12 your Honor?

13 A. My understanding is the same here that these numbers
14 indicate the amount of fentanyl sold from RDC to the listed
15 pharmacy for the specific year.

16 Q. There's nothing about these exhibits which you would
17 explain to the jury reflects that any of the fentanyl on either
18 of these exhibits ever was diverted for non-medical purposes,
19 correct?

20 A. These exhibits -- correct, these exhibits don't indicate
21 anything about what further happened to the fentanyl.

22 Q. Your Honor, may we have Government Exhibit -- I'm just
23 going through what they showed, 103B.2. You were shown
24 Government Exhibit 103B.2. This weekly activity sheet, a
25 report compliance order to Julius Morton. Laurence Doud's name

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Rosenberg - Cross

1 is not on this, correct?

2 MR. BURNETT: Objection. There's a prior document
3 that it's attached to.

4 Q. Actually, I'm asking about this document. Is Laurence
5 Doud's name on this document?

6 A. If you could just give me a moment to read it. I only
7 skimmed it before. I do not see his name on this document.

8 Q. And in any other email whether Laurence Doud's name is on
9 it or not, you don't know whether or not Mr. Doud actually read
10 anything that you have testified about, correct?

11 A. I have no knowledge about what Mr. Doud does or does not
12 know.

13 Q. Your Honor, may we have 101F, please. Government Exhibit
14 101F which you were asked about. You indicated was to
15 compliance from Jessica Pompeo. Larry Doud's, Laurence Doud's
16 name is not on this email either, correct?

17 A. Correct, from what I can see.

18 Q. Your Honor, may I have 108K please. Looking at 108K, this
19 email is to Bill Pietruszewski to Jessica Pompeo and the other
20 thread Bill Pietruszewski and Jessica Pompeo and then from
21 Arthur Kersey to Bill Pietruszewski. Laurence Doud's name is
22 not on any of these emails, correct?

23 A. Correct.

24 Q. Your Honor, please 108F. Now looking at 108F -- I'm sorry.
25 We could take that off. 108T, your Honor, that you were asked

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Rosenberg - Cross

1 about. Again, this is from Mary Sykes to Jessica Pompeo.

2 Jessica Pompeo to Bill Pietruszewski. Jessica Pompeo again to
3 Bill Pietruszewski. Laurence Doud is not on that thread,
4 correct?

5 A. Correct.

6 Q. May we have 109F, please. 109F here again it's from
7 Jessica Pompeo to Chris Noulis, copy to Bill Pietruszewski and
8 the original notice is to Jessica Pompeo. Laurence Doud's name
9 is not on this one either, correct?

10 A. On this page it is not, correct.

11 Q. Your Honor, may I have 110A.1. And this was the article,
12 correct?

13 A. Correct.

14 Q. That was attached to the emails that we just talked about?

15 A. One of the emails, yes.

16 Q. And may we have 111D, please. And 111D that you were asked
17 about is the control order of interest on the bottom sent to
18 Jessica Pompeo, and then the above thread is Kevin Taraszewski
19 to Jessica Pompeo. Again on this one no Larry Doud, correct?

20 A. On this first page, correct.

21 MR. GOTTLIEB: Your Honor, I have no further
22 questions.

23 THE COURT: Any further questions?

24 MR. BURNETT: Very, very briefly.

25 THE COURT: All right.

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Rosenberg - Redirect

1 REDIRECT EXAMINATION

2 BY MR. BURNETT:

3 Q. Let's take a quick look at Government Exhibit 103B.2. Is
4 this one of the documents that you were just asked about?

5 A. It is.

6 Q. And you were asked if Larry Doud appeared on this specific
7 document?

8 A. I was.

9 Q. And just to be clear, this is the document where Julius
10 Morton recommended that Regal Remedies be suspended, correct?

11 A. Correct.

12 Q. Was this attached to an email?

13 A. It was.

14 Q. Let's look at Government Exhibit 103B. Is this the email
15 it was attached to?

16 A. It is.

17 Q. Do you see Mr. Larry Doud's on that email?

18 A. I do.

19 Q. Now, let's take a look ahead to Government Exhibit 110A.1.
20 You were also asked if Mr. Doud appears on this news article,
21 correct?

22 A. Correct.

23 Q. Was this news article attached to an email?

24 A. It was.

25 Q. Let's take a look at 110A. Is this the email it was

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Rosenberg - Recross

1 attached to?

2 A. Yes.

3 Q. Do you see Mr. Doud copied on that email?

4 A. I do.

5 MR. BURNETT: No further questions.

6 THE COURT: Any further questions.

7 MR. GOTTLIEB: Very briefly.

8 RECROSS EXAMINATION

9 BY MR. GOTTLIEB:

10 Q. As I asked you before with the two that were just shown to
11 you about Laurence Doud's name, you're not able to say that
12 Laurence Doud ever saw it or read them, correct?

13 A. Correct.

14 MR. GOTTLIEB: Thank you, your Honor.

15 THE COURT: Any further questions?

16 MR. BURNETT: No, your Honor.

17 THE COURT: Thank you. You can step down.

18 (Witness excused)

19 THE COURT: Ladies and gentlemen, we're go to adjourn
20 for the day. This is my intention. I intend to try to attempt
21 to finish all the witnesses tomorrow. If we do that, I'm going
22 to give you Friday off. I know that Friday night and Saturday
23 morning, there may be a storm, so can you prepare yourselves
24 for that. If we can finish the witnesses tomorrow, I'll give
25 you Friday off. And Monday, we will have the summations, or

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Rosenberg - Recross

1 closing arguments, of the lawyers. And then after we finish
2 that, I'll instruct you on the law and send you in to begin
3 your deliberations. So that will be either sometime, hopefully
4 sometime at the end of the day Monday or sometime on Tuesday.
5 OK? So that's my intent.

6 I think I'm going to stick with not having you come in
7 on Friday. If we don't finish the witnesses tomorrow as I
8 plan, then we'll finish them up Monday and then go into the
9 summations after we finish up the witnesses, because I don't
10 anticipate at this point that there will be significantly
11 lengthy witness by Monday.

12 Don't discuss the case. Keen an open mind. Plan on
13 that, and I'll see you tomorrow morning at 9:45. We'll see if
14 we can finish the witnesses tomorrow.

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(Jury not present)

THE COURT: Will be the government be prepared to rest?

MR. ROOS: We want to look at the exhibit list tonight, make sure there's nothing missing. But with the exception of the possibility of a rebuttal witness, if they put in a chart, we don't have any other witnesses we're planning to call.

THE COURT: You intend to rest at this point.

MR. ROOS: That's correct, your Honor.

THE COURT: All right.

And are we prepared to do your witnesses tomorrow?

MR. JANEY: We are, your Honor. With the Court's permission, the second witness will be here at 2:30 tomorrow.

THE COURT: How long do you anticipate that witness is going to testify?

MR. JANEY: If I can just take a step back. We have a witness that can be available tomorrow morning; that's the character witness, subject to your Honor's scheduling desires. I believe that the expert witness is probably, given everything that has now been admitted in evidence and the testimony that the jury's already heard, I anticipate it to be an hour, maybe an hour and a smidgen over. And by that, I don't mean an hour and a half. If it's over, it's over by, like, four or five minutes.

MlqBdou6

1 THE COURT: Is there something magical about 2:30?
2 Can we get him here earlier?

3 MR. JANEY: I don't know the answer to that, your
4 Honor. After the last discussion with the Court, what I
5 relayed was that the Court is willing to accommodate whatever
6 is going to work, and 2:30 was the answer.

7 THE COURT: Well, I would reach back out to your
8 witness. If we start your first witness at 10:00, I assume
9 that witness will be off the stand by 10:45.

10 MR. JANEY: Yes, your Honor. Based on the
11 conversations that I've had with the witness, the expert,
12 moving around, etc., the two things that I've relayed to him, I
13 do not believe -- and I will certainly go about go back and
14 make a follow-up phone call -- but the witness is not going to
15 be available in the morning.

16 THE COURT: Well, you can tell the witness that I will
17 expect the witness to be here no later than 2:30. The earlier
18 the witness shows up the earlier the witness can get out of
19 here and that essentially the defense is going to have a gap of
20 several hours where the jury's cooling their heels, waiting for
21 this witness. So my suggestion would be, to whatever extent
22 it's possible, for this witness to be here by -- my best
23 suggestion would be 11:00, but to be here sometime before lunch
24 if they can rather than after lunch so the jury doesn't have to
25 cool their heels, because I wouldn't have a reasonable

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1 explanation to give to the jury as to why we're sitting around
2 waiting on your witness.

3 MR. JANEY: I understand, your Honor, and I'll
4 apologize in advance. I'm not trying to be frustrating.

5 THE COURT: Don't apologize to me. I don't want it to
6 prejudice your case. This is your witness.

7 MR. JANEY: I understand, your Honor. Based on the
8 conversation that I had -- and I will go back -- I don't
9 anticipate that this witness will be ready at 11:00.

10 THE COURT: All right. Well, see if anytime earlier
11 than 2:30 this witness can be ready; the earlier this witness
12 can get here the better off we all will be, even that witness,
13 because that's the earliest we'll get the jury done. If this
14 witness is here at 11:00 and we start this witness at 11:00,
15 there's a good chance this witness will be out of here before
16 lunchtime. If the witness can come at two, one, 12, ten,
17 whenever the witness gets here, depending on how you want to
18 proceed, I'll put the witness on. Whenever the witness arrives
19 here, if the witness can give us an earlier time, I would
20 prefer a much earlier time.

21 MR. JANEY: I understand, your Honor.

22 THE COURT: As soon as we're finished with that
23 witness, I'll be sending the jury home for the weekend.

24 MR. JANEY: Understood.

25 MS. ROTHMAN: Your Honor, could we raise just two

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1 issues with respect to the defense witnesses? As to the
2 character witness, we haven't received any 26.2 material, so I
3 don't know what this witness is going to say.

4 THE COURT: She's going to stay Mr. Doud has a good
5 character. That's what character witnesses say.

6 MS. ROTHMAN: I would say two things. If they have
7 met with this witness and there are notes, we're asking for
8 them. And the second thing is, as the Court knows, typically,
9 giving specific instances of good character is improper.

10 THE COURT: It's not allowed.

11 MS. ROTHMAN: Right. I want to make the ground rules
12 are set for what we're going to hear tomorrow from that
13 witness.

14 THE COURT: If you want to respond Mr. Gottlieb, you
15 can, but I'm very confident that you know what the rules are.

16 MR. GOTTLIEB: I do, your Honor, but I appreciate that
17 guidance that we should abide by the law.

18 MS. ROTHMAN: I just want to be clear, there are no
19 notes --

20 MR. GOTTLIEB: No notes.

21 THE COURT: Do you have anything to turn over at this
22 point?

23 MR. GOTTLIEB: No. We've said that before, and you
24 can ask me a million times.

25 THE COURT: Mr. Gottlieb, talk to me. Don't talk to

MlqBdou6

1 her. All right?

2 You're saying we are ready to go, right?

3 MR. GOTTLIEB: Ready.

4 THE COURT: I take your word for it. We'll be
5 prepared to get this witness on the stand no later than 10:00.
6 I think what I'm going to try to do, it would also be helpful
7 to get this other witness earlier, because I like to spend some
8 time talking about the jury charge, and I know you want to do
9 that as early as possible. I'd rather not have this witness
10 get on the stand at 2:30 and then we have to go to 5:00.

11 MR. JANEY: If I can say one further thing,
12 anticipating a potential question from the government, and a
13 lot of this is moving very quickly. There have been some
14 revision to the expert slides. We will make sure that the
15 government gets this email.

16 THE COURT: Okay.

17 MR. GOTTLIEB: Your Honor, I did have a question about
18 the charge conference.

19 THE COURT: Yes.

20 MR. GOTTLIEB: Did you have, was there any chance that
21 we would have a charge conference on Friday?

22 THE COURT: Maybe, but what I propose is that I give
23 you a draft tomorrow before the end of the day, and we can talk
24 about it briefly. I can tell you what's in it, and then can
25 you look it over and then we can discuss it further.

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1 It probably makes more sense, if you have anything
2 other than minor suggestions or changes, it probably makes more
3 sense for me to just, instead of trying to meet with you
4 Friday, to get something in writing from you and I can go over
5 it over the weekend, and then Monday morning, early, I can let
6 you know whether or not I made adjustments or let you argue
7 further, if you need to argue further. I don't anticipate
8 major, major changes.

9 The only thing I'll flag for you right now is what I'm
10 still working on, debating. I'm not sure what the parties'
11 position is and whether this is in dispute with regard to the
12 amount of fentanyl. I understand that the government has
13 charged over 400 grams of fentanyl. I understand that it could
14 effect the penalty if it's 40 to 400 or if it's under 40.
15 Quite frankly, it's kind of difficult for me to understand how
16 the jury could come up with under 400 but more than 40 based on
17 this evidence. I'm not even sure that that's really the issue
18 that you guys want to fight about, the quantity of fentanyl. I
19 mean, obviously, there was a significant amount of fentanyl
20 sold, and more than 400 grams was sold. To sort of say that
21 this evidence would give a reasonable jury a basis to conclude
22 that it was 35 grams of fentanyl, I'm not sure how that's even
23 possible. It seems to me it was either over 400 or it wasn't,
24 and I'm not sure that that number is genuinely in dispute.

25 So think about that. That's an issue I'm focusing

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1 more on the verdict form than on the jury charge. I'm going to
2 give a charge; you'll be more interested in the substantive
3 charge. Most of the standard charge, general charges are out
4 of Sand's jury instruction. Pretty much word for word I use
5 that, except I take some suggestions from the parties. It's
6 fairly standard, so the only real issue that I'm spending my
7 last few days concentrating on is how to charge the conspiracy,
8 and at this point I intend to charge the conspiracy -- the only
9 thing that's a little tricky is that I have to make a
10 distinction, unless you tell me not to, between the drug
11 conspiracy and the overt acts and the fraud conspiracy.
12 Basically, a drug conspiracy don't require the overt acts that
13 the fraud conspiracy does. I think I've fashioned a way to
14 address that, by saying that to prove a conspiracy you have to
15 prove these elements, and that to prove a drug conspiracy,
16 these are the elements, the substantive issues. And with
17 regard to the conspiracy to defraud, there needs to be an overt
18 act in furtherance of the conspiracy.

19 That's really the only distinction, that the
20 conspiracy to defraud requires an overt act and the drug
21 conspiracy does not. But I will try to be in a position as
22 early as possible tomorrow to give you a draft so that you can
23 look at it right away and react to it, and then you can take
24 some time the next day and/or over the weekend. And obviously,
25 if you have suggestions that you think are important, try to

MlqBdou6

1 get it to me as early as possible so I at least have a day over
2 the weekend to respond to it, so first thing Monday morning I
3 can tell you whether or not I've taken those suggestions and
4 you can note your objections, if you have objections to it,
5 before the charge.

6 I don't really anticipate that it's worth trying do
7 that on Friday and if I don't, if we're not going to have the
8 jury here, I'm not sure that it really is worth everyone
9 gathering into the courthouse to do what I think may not be
10 major discussion. But take it tomorrow, and we can discuss it
11 further tomorrow; I can take a quick look at it.

12 The only other question that I have is approximately
13 how long does the government anticipate that they will be on
14 summation?

15 (Continued on next page)

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1 MR. ROOS: Definitely over an hour, but honestly, your
2 Honor, it's nowhere close to written so I really, I would just
3 be coming up with a guess at this point.

4 THE COURT: A guess is better than no guess.

5 MR. ROOS: Two hours.

6 THE COURT: What about the defense?

7 MR. GOTTLIEB: Boy, I wasn't even going to say that.

8 THE COURT: I think he's right, that is a guess. I
9 don't think he's basing it on anything at this point. He
10 hasn't organized it.

11 MR. ROOS: I have nothing right now.

12 THE COURT: That's fine.

13 MR. GOTTLIEB: The best I can guess would be about two
14 hours and five minutes.

15 MR. ROOS: That's probably right.

16 THE COURT: I'm going to assume that the summations
17 are going to be somewhere between an hour or two. Okay? If
18 you start to go much beyond that time period, then I'm probably
19 going to ask you are you almost finished.

20 But I don't, unless you tell me it's going to be six
21 hours, it's usually not my practice to put a time limit on your
22 summation. As long as you're making appropriate arguments,
23 based on the evidence, and not being repetitive. So you can
24 say whatever you need to say.

25 So, but that really means that it is going to take us

M1q3dou7

1 probably most of the day to do the summations. Because we have
2 the government's summation, the defense summation, and then the
3 government's rebuttal. So, the real question I'll have to try
4 to figure out is whether or not I should try charging the jury,
5 if we sum up on Monday morning, how quickly we can start, and
6 whether or not I am going to charge the jury that day or
7 whether I'll wait until Tuesday morning to charge the jury.

8 I usually like to give the jury at least about an hour
9 or so to deliberate the day that I charge them. So, if we
10 finish somewhere between 3 or 4 o'clock, it's likely I will
11 charge the jury. If we finish somewhere like 4:30, then I
12 probably will wait until the next day to charge the jury. So
13 that's my process.

14 As I say, consider this a rough draft. So if you have
15 suggestions, and some of this stuff will have changed already
16 by the time you give me the suggestions. But if you have
17 suggestions or objections, let me know, and but just consider
18 this to be a draft at this point that I'm working on. I'm
19 going to go through it a couple more times, and then hopefully
20 I'll have it to you, definitely have it to you before the end
21 of the day tomorrow. If I can, I may try to get it to you by
22 lunch time if I have time to address it tonight and tomorrow.

23 So let's be prepared to wind up tomorrow. And let's
24 try to get these witnesses in here as quickly as possible. I
25 think that my sort of feeling is that your witness is a little

M1q3dou7

1 loosey-goosey about what time he can show up. That if I said
2 yesterday I don't care what's got to do, to be here at
3 11 o'clock, he'd be here. So, let's try and figure out, let's
4 see him work a little bit more with us if he can.

5 MR. JANEY: I understand, your Honor.

6 THE COURT: So I won't have to tell the jury at 10:30
7 that the next witness will be here at 2:30.

8 MR. JANEY: Understood, your Honor.

9 MR. ROOS: If we have a rebuttal witness, should we
10 have the person come early in the day?

11 THE COURT: Depends what you are going to rebut. I
12 think that if you have a rebuttal witness, that if the
13 government can get some sort of at least response or commitment
14 that this witness is going to be here early, notify both the
15 Court and the other side tonight, and let us know that the
16 witness says that they can come at 1 o'clock instead of 2:30 or
17 11 o'clock, and so we'll know then. If you are going to have a
18 rebuttal witness, I would say plan on that witness being here
19 like noon.

20 MR. ROOS: Okay.

21 THE COURT: And either we'll do them just before lunch
22 or if we have to do them after lunch, they can wait around for
23 a couple hours if we do a rebuttal at all.

24 MR. GOTTLIEB: Can we find out tonight who the
25 rebuttal witness is. Because there is no secret, the only

M1q3dou7

1 issue is we are going to seek to have that chart introduced.

2 MS. ROTHMAN: We'll send you his name.

3 THE COURT: Okay. See you tomorrow morning.

4 (Adjourned to January 27, 2022, at 9:45 a.m.)

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GOVERNMENT EXHIBITS

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904 and 9061331
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908 A1346
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910, 9111418
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9121419
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12201439
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6331446
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9081477
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DEFENDANT EXHIBITS

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T11354
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T21359
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